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In the Supreme Court
of the United States

OCTOBER TERM, 1955

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,

Petitioner,

vs.

MARTIN E. ADEN, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hawaiian Pineapple Company, Ltd. (hereafter "Petitioner" or "Pineapple") prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment entered in the United States District Court for the District of Oregon against Petitioner and in favor of 99 individuals, Martin E. Aden, et al, *the writ to issue only in the event* this Court should grant the petition for a writ of certiorari filed at this Term by International Longshoremen's & Warehousemen's Union (CIO) (hereafter "International") and International Longshoremen's & Warehousemen's Union, Local 8 (hereafter "Local").

OPINIONS BELOW

The opinion of Judge Fee of the United States District Court for the District of Oregon denying, respectively, Petitioner's motion for a partial new trial and the motion of International and Local for judgment notwithstanding the verdict and for a new trial, is reported as *Curto v. International Longshoremen's Union,* in 107 F. Supp. 805 and appears in the printed record at pages 149-177.

The opinion of the Court of Appeals for the Ninth Circuit written by Circuit Judge Chambers for himself and Circuit Judges Healy and Bone is reported in 226 F. (2d) 875 and appears in the printed record at pages 1497-1521.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 25, 1955 (R. 1522). Timely petitions for rehearing were filed both by Pineapple and by International and Local and were each denied on January 11, 1956 (R. 1523). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

In an action brought against two unions for violating Section 303 (a) (1) (the "secondary boycott" provisions) of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 U.S.C.A. (Supp. 1955), Sec. 187, and against the unions and 99 individuals for engaging in unlawful common law acts, pursuant to a conspiracy, the trial court

refused to submit to the jury the issue of the common law liability of the individuals for their unlawful acts causing damage, separate and apart from their liability as co-conspirators with the two unions.

Instead, the trial court over objection instructed that a verdict could be rendered against the individuals only if (1) one or both the unions was liable under the Act and (2) the individuals had entered into a conspiracy with either or both of the unions to restrain trade and to (in effect) violate the secondary boycott provisions of the Act.

The questions presented are:

1. Whether the liability of the individuals for their tortious common law acts should have been directly submitted to the jury.

2. Whether the trial court's instructions as to the liability of the individuals were erroneous.

STATEMENT

Stemming out of the nationally publicized "pineapple riot" staged at the Port of The Dalles, Oregon, on the Columbia River on September 28, 1949, this case involves an action instituted by Pineapple against International, Local and 99 individual longshoremen to recover damages for injuries to its business and property sustained by reason of the unlawful activities of the defendants.

The action was tried before a jury who returned a verdict of $201,274.27 in favor of Pineapple and against

the two unions. However, the jury (in the language of the Court of Appeals) "about-faced" and rendered a verdict in favor of the individuals and against Pineapple (R. 136).

The Basic Facts

The basic facts involved in this case were succinctly summarized by District Judge (now Circuit Judge) James Alger Fee in his detailed opinion denying the motions for a new trial:

> "The evidence tended to show the situation which will be hereinafter set out. Owing to a tie-up of transportation from Hawaii caused by the activity of International and affiliated local unions in the Territory, Pineapple, in order to convey a cargo worth approximately half a million dollars, which was intended ultimately for a processing plant owned by a subsidiary in California, had chartered the navy barge YFN624, which was loaded with facilities and by employees of Isleways, Ltd., a wholly owned subsidiary. This barge was towed across to the mainland by the ocean going tug "Ona," owned by Isleways. Upon arrival of the barge in the harbor of Tacoma, Washington, it was impossible to unload the cargo there, owing to resistance among labor groups in that port, engendered directly or indirectly by International. Thereafter the barge was turned over to a river tow boat by the Ona and was brought up the Columbia River ninety miles past Portland to The Dalles, Oregon, on September 24, 1949. Before its arrival there, Matt Meehan, who was a representa-

tive of International in the area, engaged in a series of conferences with officials of the Port of The Dalles, wherein he insisted that the cargo be not unloaded and that the facilities be not furnished to the barge. His address was truculent and aggressive. An Hawaiian, claimed to be a member of a local union there affiliated with International, was flown from the islands and arrived at The Dalles. There were meetings of the members of Local in its hall at Portland, Oregon, at which Meehan was present and took part in the discussion. The next morning members of Local, to the number of from two hundred fifty to four hundred, proceeded in small groups by private cars to The Dalles, a distance of ninety miles. There members of Local and the Hawaiian formed a picket line outside the dock of the Port of The Dalles, a municipal corporation.

"After the picket line had been maintained for some days, certain of the longshoremen, hearing of the approach from outside the state, of teamsters belonging to a local teamsters union in California but who were engaged by Pineapple, met these employees at a point several miles from the dock, gave them an outline of conditions there and attempted to prevent their going further. However, two trucks went upon the dock in the morning and, when one of these had been loaded, the supervisor drove out and led two other trucks with drivers and helpers through the picket line and into the dock enclosure. Thereupon, in a riotous, threatening and violent manner, the longshoremen broke through the cordon

of local police and rushed onto the dock. Some of them assaulted each of these employees of Pineapple. Two, in particular, were set upon by the longshoremen, who kicked them, beat them, and threatened them with death. The truck drivers were thus coerced into submission and, under threat of death or great bodily harm, promised not to interfere further. The four trucks returned to California empty.

"The longshoremen, who rushed upon the dock at the time, proceeded to the dock's edge, having armed themselves with various weapons which they were able to pick up, attempted to damage a crane and threw some four hundred cases of pineapple into the Columbia River and attempted ineffectually to set the barge adrift. Thereafter, the longshoremen were recalled from the dock and gathered in a group outside the boundaries of the Port, where they were addressed by Meehan, who is said to have complimented them upon the measures which they had just taken, but instructed them to remain outside the property. Thereupon, the picket line dispersed. * * * A number of the individuals who had gone on the dock were arrested, indicted and convicted of the crime of riot in the Circuit Court of the State of Oregon by pleading guilty to an indictment (here introduced in evidence) which charged, in part, that each of them 'did then and there unlawfully, wilfully, routously and riotously trespass upon inclosed premises not their own, or either of them, namely, the

premises of the Port of The Dalles; and did then and there unlawfully, routously, riotously and feloniously make an assault upon Don Higham, Eugene Hoard, Elvy Davis, Clarence Rosales and Raymond Curto, by then and there unlawfully and feloniously striking and beating them with said cargo hooks, iron bars, clubs and sticks'." (R. 150-152)

Twenty-two individuals pleaded guilty to the crime of riot. Thirty-eight others admitted they went upon the dock during the riot and thirty-two others admitted they were at or near the Port dock.

As the result of the riot, the Port of The Dalles was forced to discontinue the unloading of the barge. Pineapple's crane and trucks were put out of commission, and repairs could not be effected to the crane until about ten days after the riot (R. 486, 686, 1038, 1040).

By the time the crane was repaired, however, Pineapple had sustained the largest element of its damages. Pineapple's plant at San Jose, California, had previously purchased large quantities of perishable fruits to be mixed with cherries and pineapple from the barge in the preparation and canning of "fruit cocktail". To prevent the spoilage of these fresh fruits while awaiting the arrival of the pineapple on the barge, Pineapple's plant had been forced to process and can them into a mixture known as "fruit mix". By the time the crane was once again in operation, the San Jose plant had been forced to process and can all of the fresh fruit into fruit mix. Inasmuch as there was no market for fruit mix, Pineapple was required

to reprocess all of it, after the eventual receipt of the pineapple from the barge in California, so as to make fruit cocktail.

Accordingly, the items of damage for which Pineapple sought redress included not only the extra expense to which it was put by being forced to reprocess the fruit mix into fruit cocktail, but also the various other damages sustained by it: truck and crane repairs, lost cases of pineapple, cut mooring lines and destroyed gangway, medical and hospital expenses of injured employees, charter hire of the tug and barge which were forced to lie idle, special police costs, etc.

Pineapple's Action (Jurisdiction)

To recover the damages it sustained, Pineapple instituted an action against International, Local and 99 individual longshoremen alleging that these defendants had engaged in various specified activities, pursuant to a conspiracy, which activities on the part of the labor unions constituted a violation of Section 303 (a) (1) of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 USCA (Supp. 1952) Sec. 187, and on the part of the individuals were tortious acts under the common law.

The jurisdiction of the District Court, insofar as the two unions were involved, was based on Section 303 (b) of the Act, it being admitted that International and Local were each a "labor organization" under Section 501 (3) of the Act and that the action involved an "industry or activity affecting commerce" under Section 501 (1) of the Act (R. 50-51, 157, 1050).

The jurisdiction of the District Court, insofar as the individuals were concerned, was based on 28 USCA Sec. 1332 (Diversity of Citizenship), it being admitted that Pineapple was a Hawaiian corporation and that the individuals were citizens of states or territories other than Hawaii, with the amount in controversy exceeding $3,000.00 exclusive of interest and costs (R. 50, 51-52).

After extended pretrial conferences (R. 183-348), the District Court entered a Pre-Trial Order which by its terms superseded the pleadings (R. 76). The Pre-Trial Order set out the contentions of the parties and the issues raised thereby.

In its contentions in the Pre-Trial Order, Pineapple alleged the various unlawful actions committed on September 28 by the individuals in violently entering the port dock and staging a riot thereon with consequent damage to Pineapple's business and property, which allegations were denied by the individuals (R. 58-59, 61-63, 65).

Specifically framed as "issues" in the Pre-Trial Order were those of whether the individuals "engaged in the acts and conduct alleged" by Pineapple (Issue 8; R. 67); and, if so, whether such acts and conduct were the proximate cause of damage to Pineapple and, if so, in what amount (Issues 9, 10, 11; R. 67).

On the issues thus posed, Pineapple at the trial presented direct and uncontradicted proof (according to both the opinions of the trial court and the Court of Appeals)

that the individual defendants engaged in unlawful acts by their riotous conduct on September 28 and that these unlawful acts were the direct and proximate cause of damage to Pineapple's property and business. Yet the trial court, as noted below, failed and refused to submit to the jury the issue, so raised and supported by the proof, of the liability of the individuals for their unlawful acts.

The Trial Court's Instructions

The trial court instructed the jury at length concerning the liability of either or both unions for violating Section 303 of the Act, which instructions are presently the basis for the petition for a writ of certiorari filed at this Term by International and Local.

As to the liability of the individuals, the trial court (to the surprise of all parties, no such instructions having been previously submitted or discussed) instructed the jury that an individual defendant could only be found liable (1) *if* one or both unions was found liable under the Act (Tr. 1435-1440); (2) and *if* the individual was a member of a "conspiracy" between either or both of the unions and the individual defendants (Tr. 1436-1437, 1448-1450); (3) and *if* the "conspiracy" involved was one (a) to restrain trade and commerce between Hawaii and any state and (b) to violate (in effect) the provisions of Section 303 (a) (1) of the Act[1].

---

[1]The Court of Appeals agreed with Pineapple's objection that the trial court erred in instructing that an individual could not be found liable unless the unions were first found liable, but went on to hold that the jury finding of liability against the unions, in effect, "cured" this error (R. 1508).

Secondly, the trial court failed and refused to give any instructions whatsoever, despite previous requests made by Pineapple, with respect to the common law liability of the individuals for their unlawful invasion of the dock, separate and apart from any question of their liability as co-conspirators with International and Local. The specific instructions requested by Pineapple are set out in Appendix "A" attached to this petition.

Thus, the liability of an individual defendant was submitted to the jury solely on the basis of whether he was a conspirator with either or both unions to restrain trade between Hawaii and any state and to violate the prohibitions of Section 303 (a) (1) of the Act.

By its exceptions (which appear in Appendix "B" to the Opinion of the Court of Appeals and are set out in the record at pages 1450-1451), Pineapple put the court on notice of its cause of action against the individuals for damages flowing from "to just physically stop a business operation in connection with the riot and other activities they engaged in", and objected to the failure of the trial court to instruct the jury that Pineapple could recover against the individuals on this basis rather than under the Labor Management Relations Act.

REASONS FOR GRANTING THE WRIT

1. Inasmuch as common law principles are primarily involved in this case, it might not at first glance be deemed sufficiently important by this Court to warrant an independent petition for certiorari, despite its significance to the rapidly developing body of law enunciating

common law liabilities for tortious acts in the course of industrial disputes.

But if this Court were to grant the petition of International and Local for a review of Pineapple's judgment against them, we believe this Court should at the same time review the entire case, including Pineapple's action against the individuals, and correct the manifest error of the court below in affirming the exoneration of the individuals. Accordingly, we are filing this conditional petition.

2. The actual practical effect of the judgment we are protesting in this case is that despite "uncontroverted and incontrovertible evidence" (R. 1508) that at least sixty of the individual respondents unlawfully went on the port dock and there rioted against Pineapple, injuring its employees and damaging its business and property, not one of such individuals was held liable.

The jury's verdict in this respect was a true miscarriage of justice under which violence has been sanctioned and individuals have been allowed to escape liability for their unlawful acts.

We say this unjust verdict (even acknowledged to be so, in part, by the Court of Appeals) resulted from the failure of the trial court to allow the jury to separately pass upon the liability of the individuals for their riotous activities and was further due to errors committed by the trial court in the actual instructions it gave to the jury with respect to their liability.

3. We recognize that this Court is not designed to give a losing party before the Court of Appeals another hearing, nor is it concerned primarily with the correction of errors. Should this Court decide to review this case, however, we submit that this unjust verdict exonerating the individuals calls for the exercise of this Court's power of supervision, inasmuch as it sanctions a complete departure from accepted and customary rules in determining the liability of individuals for their tortious acts.

It is fundamental (under both Federal and Oregon decisions) that a charge of conspiracy is not the gravamen of a complaint. Even if a conspiracy were not proved, Pineapple would still have been entitled to recover damages against such of the individuals as were shown to have been guilty of unlawful acts directly resulting in damage to it. *James v. Evans,* 149 F. 136 (CA 3, 1906); *Keller v. Commercial Credit Co.,* 149 Or. 372, 40 P. (2d) 1018 (1935); *Gabriel v. Collier,* 146 Or. 247, 255, 29 P. (2d) 1025, 1028 (1934); see *Howland v. Corn,* 232 F. 35, 40 (CA 2, 1916); *Ewald v. Lane,* 104 F. (2d) 222 (CA, D.C., 1939), cert. denied, 308 U.S. 568.

All of the individuals, who participated in the unlawful invasion of the dock and rioting against Pineapple, were liable to it under the common law for the damages flowing from their acts irrespective of their degree of participation. See *Calcutt v. Gerig,* 271 F. 220 (CA 6, 1921); *Saunders v. Gilbert,* 156 N.C. 463, 72 S.E. 610 (1911); *Meints v. Huntington,* 276 F. 245 (CA 8, 1921); 46 Am. Jur., Riots and Unlawful Assembly, Sec. 18, p. 135; Restatement of Torts, Section 876.

Accordingly, in its action Pineapple predicated the liability of the individual defendants upon the legal basis that they had engaged in various unlawful activities, pursuant to an alleged conspiracy with the unions to injure Pineapple's business. The individual defendants could therefore be liable in two ways: they and the unions were part of an unlawful conspiracy to injure Pineapple's business and property; or the individual defendants had engaged in various unlawful acts, the principal one being the unlawful invasion of the dock and the destruction of Pineapple's property and injury to its employees. If the conspiracy charge was not proved, Pineapple was still entitled to recover the damages it sustained as a result of the unlawful acts of the individual defendants.

The trial court departed from these well accepted principles when it failed and refused to submit to the jury the issue of the common law liability of the individuals for their riotous activities of September 28. The instructions submitted by Pineapple would have squarely submitted to the jury this issue and would have allowed the jury to pass directly upon the liability of the individuals regardless of whether they were engaged in any conspiracy with the unions.

The trial court had a mandatory duty of submitting to the jury every material fact raised by the pleadings and supported by the evidence. *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). Failure to submit such an issue for the jury's consideration is error. *Marande v. Texas & Pacific Railway Co.*, 184 U.S. 173 (1902); *Cal-*

len v. Pennsylvania Railroad Co., 332 U.S. 625 (1948). Such a failure to submit an issue constitutes the direction of a verdict against the aggrieved party on that issue, but a verdict only may be directed if there is a mere scintilla of evidence or none at all. This was hardly the state of the evidence with respect to the tortious acts of the individuals.

The prejudice that resulted from the failure of the trial court to submit the naked issue of the liability of the individuals, regardless of any alleged conspiracy with the unions, was that they were deprived of having the jury pass upon the simplest and best case that Pineapple had against the individuals, namely, whether the individuals, or any of them, engaged in unlawful acts against Pineapple which resulted in damage to it.

4. Further indicative of the need for a supervisory review by this Court is the situation that Pineapple's contentions as to the errors committed by the trial court (as set forth in its motion for a partial new trial and in its Specifications of Error on appeal) have never even been stated by the trial court or the Court of Appeals, as raised by Pineapple, let alone answered by either court.

The position taken by the Court of Appeals was that Pineapple tried its case against the individual defendants on an "all-or-nothing" basis of getting the same total set of damages from the individuals as from the two unions; and the verdict in favor of the individuals meant that the jury decided Pineapple was not entitled to the same damages against the individual defendants as it was entitled to against the union. Pineapple was said by the

Court of Appeals to have placed itself in a"strait-jacket" as to damages by stating an oral preference for a form of verdict in which only one amount of damages could be inserted by the jury as against the unions and the individual defendants found liable.

Such an opinion does not answer Pineapple's contentions. Whether or not Pineapple, willingly or through the action of the trial court, was placed in what the Court of Appeals called a "strait-jacket" as to damages, the uncontroverted fact remains *that there was never presented to the jury* for its determination Pineapple's contentions that its damages flowed from the riot and the resulting consequences and that the individual defendants who participated in the physical invasion of the dock and the riot were jointly liable for the damages proximately resulting therefrom.

The flaw in the Court of Appeals' reasoning, as we see it, was its assumption that there was a significant difference between the total damage for which the unions were held liable and the total damage for which the individual defendants could have been held jointly liable. We know of no basis for any such assumption in the record.

When the Court of Appeals states that Pineapple "did not focus on the damage at the dock, but let the case go on an all-or-nothing basis", it is not dealing fairly with Pineapple.

If there was one aspect of the case on which Pineapple focused above everything else (and on this we

guarantee that opposing counsel will agree), it was the physical invasion of and the riot on the dock and the ensuing and resulting damage to Pineapple. If there was any letting "the case go on an all-or-nothing basis", it was that the participating individual defendants were liable for the common sum or total set of damages involved on the basis of (1) the conspiracy with the unions to injure Pineapple's business or (2) the riot and consequential damage therefrom.

Regardless of whether or not the conspiracy basis for the liability of the individual defendants was proven, Pineapple was still entitled by reason of its pleadings, proof, and requested instructions, to have the alternative basis for the liability of the individual defendants submitted to the jury. This the trial court failed and refused to do, and the Court of Appeals has lent its stamp of approval, even though itself acknowledging the injustice involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari of International and Local at this Term, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

DONALD C. WALKER
GUNTHER F. KRAUSE
DENNIS LINDSAY
Counsel for Petitioner
916 Portland Trust Building
Portland, Oregon

APPENDIX A

Requested Instructions of Pineapple

"If you find from a preponderance of the evidence that certain individual defendants on or about September 28, 1949, in a riotous and tumultuous manner entered upon the dock of the Port of The Dalles and thereby placed in fear the employees of the plaintiff or of the Port of The Dalles, or of any other employers who were engaged in business with the plaintiff with an object of intimidating said employees and inducing them to refuse to perform their services for the plaintiff and other employers, and you further find that plaintiff sustained damages as a proximate result of such activities of the defendants, then your verdict should be for the plaintiff and against such defendants who participated, in such amount as will reasonably compensate it for the damage to its business and property." (R. 130)

* * *

"If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted certain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (R. 130-131)

* * *

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

"I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (R. 133-134)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 838

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,
Petitioners,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
240 Montgomery Street, San Francisco 4, California,
Of Counsel.

BYRON-WALOR PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,
Petitioners,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 25, 1955.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court for the District of Oregon denying motions for a new trial, after judgment was entered upon jury verdicts, and containing, as an appendix, the instructions to the jury, is reported at 107 F.Supp. 805. The opinion of the Court of Appeals affirming the judgment of the trial Court is reported at 226 F.2d 875. Both of these opinions are printed in the appendix hereto, as are the judgment of the Court of Appeals and its order denying petitions for rehearing.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 25, 1955. A timely petition for rehearing, filed by petitioners, was denied on January 11, 1956. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED.

Petitioner Local 8 is a labor organization representing longshoremen employed in Portland, Oregon. Petitioner International is a labor organization composed of various locals of longshore and other workers employed generally on the Pacific Coast and in Hawaii. Petitioners, together with more than one hundred individuals, most, if not all, of whom were members of Local 8, were named as defendants in a suit commenced by respondent in the District Court.

The original complaint alleged that the District Court had jurisdiction of the cause of action by virtue of Section 303 of the Labor Management Relations Act of 1947, Act of June 23, 1947, c. 120, Section 303, 61 Stat. 158, 29 USCA 187 (R. 1). After petitioners had filed motions to dismiss, to strike, and to make more certain (R. 14-14d), as well as answers (R. 14d-29), the District Court granted respondent leave to file an amended complaint (R. 30). The amended complaint alleged in one count that the District Court's jurisdiction rested upon diversity of citizenship (R. 31) and in two others that it rested upon Section 303, *supra* (R. 44-45).

In all three counts respondent generally alleged that petitioners and the individual defendants had conspired to injure respondent's business by preventing the unloading of a cargo of pineapple shipped by respondent from Hawaii to the mainland. While the motions and answers previously filed were deemed to be directed to the amended complaint (R. 201-03), the District Court refused to rule upon the questions presented by the motions (R. 203, 291) because "the pleadings are going to pass out of the case" (R. 188). A motion to sever the instant case from assault and battery cases brought by two employees of respondent was denied (R. 226-27, 307, 318).[1] A pre-trial order was entered embodying the contentions of the parties and the issues to be litigated. (R. 50-76.)

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[1]A jury verdict in favor of these two employees was followed by a settlement and no appeal affecting them was taken to the Court of Appeals.

After trial, the jury returned a verdict in favor of respondent and against petitioners and assessed damages in the sum of $201,274.42. (R. 136.)[2] A judgment in accordance with this verdict was duly entered. (R. 140-41.) Motions for a new trial on behalf of petitioners were denied (R. 146-48), the trial Court holding, *inter alia,* that the complaint stated a cause of action "under the Federal Labor Management Relations Act . . . [and] . . . under the common law" (107 F.Supp. at 809; R. 155; App. p. 9).

After the appeal was briefed and argued and had been under submission to the Court of Appeals for about six months, that Court requested further briefing and then, some six months later, affirmed both the judgment against petitioners and the order denying their motions for a new trial. The Court held that a cause of action was stated under Section 303 of the Labor Management Relations Act and that the trial Court had jurisdiction thereof; that the evidence supported a finding that petitioners violated that section; that it was not error for the trial Court to give a peremptory instruction that certain named individuals were "agents and representatives" of petitioners; that the instructions on the authority of the officers of petitioners were adequate; that the verdict imposing damages upon petitioners was not inconsistent with the verdict exonerating from liability every in-

[2]The jury, however, also returned a verdict in favor of the individual defendants and against respondent. Upon respondent's appeal from the judgment entered on this verdict and from an order denying its motion for a partial new trial, both the judgment and the order were affirmed.

dividual defendant despite the fact that among those exonerated were officers of petitioners and persons described in the instructions as "agents and representatives" of petitioners; and that, despite respondent's failure to minimize damages, the verdict could stand.

The questions presented by the foregoing are:

1. Whether the complaint stated a cause of action under Section 303 of the Labor Management Relations Act of 1947 and whether the trial Court had jurisdiction thereof; whether the trial Court correctly instructed the jury on the constituent elements of such a cause of action; and whether the evidence supported a finding that that section had been violated;

2. Whether the instructions that certain named individuals were "agents and representatives" of petitioners deprived petitioners *pro tanto* of a jury trial upon this important and sharply contested question of fact; and whether, in other respects, the instructions dealing with the liability of petitioners for the conduct of their officers adequately stated the criteria established in Sections 301 and 303 of the Act;

3. Whether the verdict imposing damages upon petitioners was not inconsistent with that exonerating the individual defendants from liability and whether therefore it should not have been set aside;

4. Whether the verdict could stand despite respondent's failure to minimize damages.

STATUTES INVOLVED.

Sections 301 and 303 of the Labor Management Relations Act of 1947, *supra*, are printed in the appendix hereto.

STATEMENT.

In the summer of 1948 there occurred an extended strike of longshoremen in the Hawaiian Islands, the chief protagonists being, on the one side, International's Local 136 (not a party to this proceeding), and on the other, the largest of the Hawaiian employers, commonly known as "The Big Five". The strike was the culmination of many years of attempted organization in the Islands and represented a major effort by the Hawaiian working people to free themselves from the literally substandard conditions under which they theretofore had lived and worked. (R. 537.)[3] The employers adopted an arrogant, intransigent attitude in the course of the strike and

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[3] "Q. Did he tell you that over the years those five corporations, which dominated the economic life of the Hawaiian Islands, had paid to workers in Hawaii wages at a starvation level? Did he tell you that?

A. He did, sir.

Q. Did he tell you that his union and its locals in Hawaii, particularly the Hawaiian Local No. 163 [sic], had organized those workers who were receiving those starvation wages, and were endeavoring to raise the standard of living of those people? Did he tell you that?

A. Yes, he did.

Q. And did he tell you that the Hawaiian Pineapple Company was controlled and dominated by those five large corporations? Did he tell you that?

A. Yes, I believe he did. It was quite a complete summary, sir." (R. 537.)

rejected all offers of settlement either by direct negotiation or by arbitration. (R. 540 ff.; Ex. 23.)

Respondent, which had close economic ties with the Big Five (R. 1073-74, 1166-78), knew that it would be difficult, if not impossible, to transport cargo from the Islands to the United States by the methods it normally used (R. 1018, 1289). Despite this fact, and the further fact that its contracts with its customers in the United States contained clauses which relieved it from liability for failure to deliver in the event of strike conditions (R. 958-59, 1161, 1292), respondent assembled a barge-load of pineapple in the Islands to be transported to the mainland by a tug chartered by one of respondent's wholly owned subsidiaries (R. 50). Although the pineapple was allegedly destined for the company's packing plant in San Jose, California, the cargo was shipped not to the Bay Area but to the Pacific Northwest. (R. 540, 1289.) Although The Dalles was not a port at which ocean-going vessels ever called or which had ever discharged trans-Pacific cargo (R. 544), respondent directed its barge there for unloading. Prior to the arrival of the barge, the Commissioners of the Port of The Dalles had agreed with respondent to unload it, although the port had neither facilities for unloading nor employees to perform such work. (R. 545.)

About a hundred miles west of The Dalles was the metropolitan city of Portland, with tremendous wharfage and dock facilities and thousands of skilled longshoremen (members of Local 8) who made their living and supported themselves and their families by

loading and discharging cargo. For The Dalles, a small port which handled an occasional load of local wheat, to undertake to discharge under nonunion conditions, transoceanic cargo, represented an obvious threat to the economic well-being of the Portland longshoremen. Therefore, when it became known in Portland that The Dalles was undertaking longshoring operations without consulting with the union and was about to employ farmhands to perform such work at sub-union wages, a good many Portland longshoremen went to The Dalles to investigate the situation and to protest this obvious threat to their livelihood. (R. 1239, 1263, 1365.) They were at The Dalles for two or three days late in September, 1948, during which period of time a riot erupted, as a result of which considerable damage was done to the dock property and some to the property of respondent.

An assistant chief of police (R. 592) called as a witness by respondent described what happened:

> "Q. Would you tell the jury just what happened—I want you to describe the beginning of this invasion of the dock.
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> * * * * * * *
>
> A. Well, as I stated before, two flatbed trucks had come in——
>
> Mr. Krause. Q. I don't want you to repeat that. I want you to tell us something about the manner in which it was accomplished, the rapidity with which it was done, and anything else you can tell us about the attitude of the men.
>
> A. Well, it just flared up in a moment. It just flared up like that and was over within just a very few minutes.

Q. The entire riot, you mean?

A. The entire riot, yes." (R. 608-09.)

* * * * * * *

"Q. And then somebody said, 'Come on, you sons-of-bitches. Are you going to let them break our strike' or words to that effect?

A. Yes, sir.

Q. And that was, as you said a moment ago, completely spontaneous, wasn't it?

A. Yes, sir.

Q. In other words, just as though somebody had thrown a match into a can of gasoline and it went up in smoke?

A. Just about that fast." (R. 632-33.)

Thereafter injunction proceedings were brought in the state courts and, after protracted litigation and negotiations, at the conclusion of which the Port paid union wages (R. 488), the barge was finally unloaded and the cargo transported to San Jose.

It is petitioners' contention here that despite the evidence of violence,[4] the judgment cannot stand because of serious errors of law which occurred below.

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[4] "The fact that physical violence was threatened should not be allowed to confuse the picture." (Staley, J., in *United States v. Kemble*, 198 F.2d 889, at 899, wherein a conviction against a union for an alleged violation of the Hobbs Act [18 USC (1940 ed.) 420d; 18 USCA 1951] was reversed.)

See also *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 ("In the instant case the violence on the picket line is not material."), and *International Union Etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253 ("While the * * * Board is empowered to forbid a strike because its purpose * * * is illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property").

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred in holding:

1. That the complaint stated a cause of action and that the District Court had jurisdiction under Section 303; that the trial Court correctly instructed the jury on the elements of a cause of action under Section 303; and that the evidence was sufficient to sustain a finding of a violation of Section 303;

2. That the trial Court correctly instructed the jury on the liability of petitioners for the acts and conduct of certain of their officers; and that the trial Court correctly instructed that certain specified persons were "agents and representatives" of petitioners, thereby withdrawing from the jury the resolution of this sharply contested question of fact;

3. That there was no inconsistency between the verdict exonerating the individual defendants and that fastening liability on petitioners; or, that if there was an inconsistency, it was legally immaterial;

4. That despite the failure of respondent to minimize damages the judgment in its favor could stand.

REASONS FOR GRANTING THE WRIT.

I.

THE HOLDINGS OF THE COURTS BELOW THAT THE COMPLAINT STATED A CAUSE OF ACTION UNDER SECTION 303 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, THAT THE TRIAL COURT HAD JURISDICTION THEREOF, THAT THE INSTRUCTIONS CORRECTLY STATED THE LAW WITH RESPECT THERETO, AND THAT THE EVIDENCE SUPPORTED A FINDING OF A VIOLATION THEREOF, ARE CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The Court of Appeals held that the complaint stated a cause of action under Section 303 and that the issues "properly went to the jury on the basis that . . . there was no legal excuse for any defendant to attempt to boycott a cargo of [respondents]". (226 F.2d at 879; R. 1502; App. p. 78.)

But there was evidence which, if accepted by the jury, would have established the "legal excuse" for any boycott which was shown to exist. Section 303 illegalizes only secondary boycotts. Yet it was applied in this case without any consideration of the fact that there was considerable evidence of primary activity. For example, the members of petitioner Local 8 were directly concerned in the hiring practices and pay scales of the Port of The Dalles and made legitimate demands on it respecting those matters. (R. 766, 806-07, 838, 877, 900, 902, 1240, 1365.)[5]

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[5] "[We were picketing] [f]or the reason that our wage structure and our hours of employment, conditions of labor, were being endangered; that the work was being carried on by members of other organizations, and we had contracts for that work in every port on the Pacific Coast. We were picketing because they were working the men 8 hours a day for a dollar and a half an hour, when our wage scale was $1.82 and time and a half after 6 hours. We were picketing because, too, we have a 2100-pound load limit

They were concerned with these matters whether the unloading at The Dalles was to be done by the Port, or directly by respondent. (R. 1285-86.) There was also evidence that respondent was so closely allied to the Big Five companies which were being struck that the activities against it were legally protected. (R. 537, 541, 1072, 1177.) In the face of such evidence it was error for the Court below to sanction the submission of the case to the jury on the theory that there was "no legal excuse" for petitioners' activities.[6]

It is clear that even primary labor disputes have secondary effects and that if Section 303 is read literally, it will outlaw even primary peaceful picketing. In order to avoid such results, which are at conflict with the clearly expressed legislative intent[7] as well as with constitutional guarantees (*Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S.

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in our contract, and these people were unloading as much as they could reach up and pile the cases on. They were breaking down our conditions." (R. 806.)

[6]Indeed, the instructions of the trial court went so far as to illegalize conversations in which truck drivers were told no more than that "the port of The Dalles was threatening the working conditions and wages of the Portland longshoremen". (R. 1427.)

[7]Senator Taft described the objectives sought to be attained by the enactment of the section as follows:

> "• • • under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." (93 Cong. Rec. 4198.)

The legislative history was thoroughly explored, and the conclusion here asserted was arrived at by this Court, in *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 686, and *N.L.R.B. v. International Brotherhood of Electrical Workers*, 341 U.S. 694, 705.

106), this and other Courts have required clear proof of secondary activity and have refused to find a statutory violation in the absence thereof. *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Douds v. Sheet Metal Workers Union*, 101 F.S. 273 (E.D. N.Y.); cf. *Oil Workers International Union and Pure Oil Co.*, 84 N.L.R.B. 315. Since there was evidence of primary activity at The Dalles, the instructions approved by the Court below on the theory that there was "no legal excuse" for petitioners' economic activities were in direct conflict with the pronouncements made by this and other Courts in the foregoing cases.

Furthermore, before Section 303 can apply it must be shown that there is economic injury to an employer totally disinterested in the main conflict. (cf. *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Douds v. Sheet Metal Workers Union*, 101 F.S. 273 [E.D. N.Y.].) Indeed, even where the employing units are separate legal entities, a close economic relationship between them renders the section inapplicable. (*Douds v. Metropolitan Federation, Etc.*, 75 F.Supp. 672 [S.D. N.Y.]; *N.L.R.B. v. Business Machine, etc.*, 228 F.2d 553 [2 Cir.].) In the face of these cases and the evidence of the relationship between respondent and the struck companies (R. 537, 541, 1072)[8], it was

[8] "Through a complex system of interlocking directorates, the Big Five is able to exert sufficient influence to control most of the Territory's economy. Their *sphere of domination* extends not only to the two basic island industries, sugar and *pineapple*, but encompasses such diverse fields as shipping, banks, and trust companies, wholesale and retail food and mercantile stores, press and radio, lumber and building materials, public utilities and tourist

error for the trial Court to remove from the consideration of the jury the issue of the existence of primary activities as a justification for the boycott and it was error for the Court below to hold that there was "properly . . . no legal excuse" for the boycott.

Other errors of the trial Court on this phase of the case which are not treated in the opinion of the Court below are:

(A) An instruction that a railroad company was a "person" within the meaning of Section 303. (R. 1424-26.)[9] This holding below is in direct conflict with the National Labor Relation Board's construction of the same section. (*International Brotherhood of Teamsters,* 84 N.L.R.B. 320.) To resolve this conflict the writ should issue.

(B) The instructions as to which was the primary and which was the secondary employer are confusing, inconsistent and ambiguous. Two opposing theories are embodied in the instructions: one, that

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trade, among others." Comment: *Alaska and Hawaii: From Territoriality to Statehood,* 38 Calif. L. R. 273, 274, n. 2 (1950).

The court below said that this contention "does not seem to have been proved to the point of any jury question" (226 F.2d at 879; R. 1502; App. 78), thereby overlooking the fact that the trial court by its rulings prevented a full development of the evidence (R. 1177, 1453).

[9]This is important for there was some evidence from which it could be inferred that petitioners interfered with business between respondent and the Union Pacific Railroad Company and that this prevented respondent from hauling its pineapple to San Jose in time to prevent the damage. The opinion of the Court below fixes the delay as the period between September 24 and October 19, 1948, "when [respondent] started to move the cargo via Union Pacific." (226 F.2d at 877; R. 1500; App. p. 75.)

the respondent was the prime employer;[10] the other, that respondent was "the other person" mentioned in Section 303.[11] Clearly, respondent could not have been both the employer and the other person contemplated by Section 303; the jury was never told which one it was.[12] Whether a judgment based on

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[10]"If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object of forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described." (107 F.Supp. 821; R. 1424-25; App. p. 41.)

[11]"Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff's cargo or with the object of the forcing or requiring either Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover." (107 F.Supp. 822; R. 1425-26; App. p. 42.)

[12]Timely exceptions were taken to each of the above-quoted instructions. (R. 1454-55; 1457.)

a verdict can stand in the face of such an equivocal charge is a question which this Court has not, but should, settle. (Cf. *Bollenbach v. United States*, 326 U.S. 607.)[13]

II.

THE HOLDINGS OF THE COURTS BELOW WHICH PREVENTED THE JURY FROM PASSING UPON THE QUESTION OF WHETHER CERTAIN NAMED PERSONS WERE "AGENTS AND REPRESENTATIVES" OF PETITIONERS, ARE CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The Court below recognized that "abstractly" the unions themselves could do nothing; that they could act only through human agents. (226 F.2d at 879; R. 1502; App. p. 78.) This of course points up the importance of the instructions on the agency question and demonstrates that any error committed in this area was of necessity prejudicial.

Despite the fact that there was the sharpest conflict between the parties as to whether certain specified persons were in fact agents of petitioners (R. 67), and despite the fact that there were indeed factual questions presented on this issue, the trial Court, with the approval of the Court below, flatly instructed the jury that certain specifically named persons were "agents and representatives" of petitioners. (226 F.2d 879; R. 1503; App. 79.)

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[13]The Court below acknowledged the novelty of this, as well as of a number of the other questions presented by this case. (226 F.2d at 880, 882; R. 1503, 1507; App. pp. 80, 86.)

The Court below justified this instruction with the observation that while there is "surprisingly" little case law on the "agency feature" of the statute, it believed that the statute was intended to cover situations in which "a union puts or lets an officer or other representative get into a position where he can and does cause trouble". (226 F.2d at 880; R. 1503; App. 80.) But whatever may be the validity of this proposition as an abstract matter of law, its assertion does not afford a solution to the problem presented by the peremptory instruction. The questions which the jury had to consider were (1) whether the named persons were in fact "officers or representatives" and (2) whether the unions did indeed put them, or let them get, into positions where they could cause trouble. The unions denied both that the persons in question were their agents or representatives and that the unions had placed them in such positions. There was evidence which supported those denials.[14] Therefore it was error to approve an instruction which took from the jury its fact-finding func-

[14]Thus, the trial Court instructed that Meehan was an "agent and representative" of the International. The record contains the following evidence concerning Meehan:

"It should be clear, however, in order to avoid any confusion in your area, that you are not empowered to direct or apply a policy on your own, but can do so only when specifically instructed by the International officers, and only at such times are you empowered to act in behalf of the International Union." (R. 1217.)

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"A. • • • But I wasn't an officer. Only elected officials are officers in our union. I couldn't commit the International to anything.

Q. You what?

A. I couldn't commit the International to anything.

Q. To anything?

tion by telling it that certain named persons were in fact "agents and representatives" of petitioners.

Other circuits have long since decided that the existence of an agency relationship (in addition to the question of its course and scope) is a question of fact to be determined, upon a record containing conflicting evidence (as does this one), by a jury. *Quinlan v. Holbrook,* 162 F. 272 (2 Cir.); *Denton v. Brocksmith,*

A. That is right. I was restricted to whatever was required by the locals concerned.

Q. Then when you go into a local situation, and when you are so representing them, do you represent the local, or do you represent the International?

A. I represent the local.

Q. You say you are without authority to commit the International to anything?

A. I have no authority to commit the International, no." (R. 1337.)

"Q. All right. By the way, Mr. Meehan, who had instructed you to contact these other union officials? • • •

Q. I said union officials, you understood; not Port officials.

A. Oh, Bob Baker [President of Local 8] asked me to——

Q. Oh, Bob Baker told you to contact the union officials?

A. Any unions that I could contact." (R. 1371-72.)

Similarly, the instruction embraced Schmidt and Bodine. As to them the record reveals:

"Q. Isn't that the Mr. Schmidt who is also one of the officers of the ILWU?

A. No. He is no officer of the ILWU.

• • •

Q. You say that he is not an officer of the International?

A. He was never an officer of the International Union. He was president of Local 10.

Q. He was president of Local 10?

A. Yes, sir." (R. 704.)

• • • • • • • •

"Q. To San Francisco, to Mr. Bodine or to Mr. Thomas?

A. Yes.

Q. Those are both officials of the ILWU, are they not?

A. No. They are what are known as coast committeemen. They are officials of the Longshoremen Division. They are not officials of the International. They are elected by the longshoremen to represent them in negotiations and in the implementation of the longshore contract." (R. 717.)

299 F. 559 (5 Cir.); *Sloat-Darragh v. General Coal Co.*, 276 F. 502 (6 Cir.); *Riverside Fibre & Paper Co. v. O. C. Keckley Co.*, 32 F.2d 23 (7 Cir.); *Mitton v. Granite State Fire Insurance Co.*, 196 F.2d 988 (10 Cir.). Indeed, in an earlier case the Ninth Circuit itself so held. *Pacific Can Co. v. Hewes*, 95 F.2d 42 (9 Cir.).

The earlier holding, which should have been followed here, was based squarely upon this Court's decision in *Gunning v. Cooley*, 281 U.S. 90, wherein it was pointed out that:

> "Issues that depend upon the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining the motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. . . . Where uncertainty . . . arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." (281 U.S. at 94.)[15]

Here, of course, as we have seen, *supra*, note 14, there was testimony which if believed (credibility),

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[15] In *United Brotherhood of Carpenters v. United States*, 330 U.S. 394, this Court stated that no matter how conclusive the evidence on the agency question might be (and here, as we have seen, there was conflict), a failure to permit the jury to resolve the question requires the reversal of the judgment.

or which if given the effect or weight urged for it by petitioners, would establish the absence of an agency relationship—or at least would demonstrate that whatever relationship existed was not with petitioner International but only with the local. Petitioner International presents this as a separate point on its own account.

Since, as the Court below conceded, the unions could not have been held in this case "without a finding by the jury" (226 F.2d at 880; R. 1503; App. 80) that persons in authority were responsible for what had transpired,[16] and since there was sharp conflict as to who in fact was in authority and what his or their relationship to each petitioner was, the jury should have been permitted to make its own finding from the evidence and should not have been peremptorily told what it was to find.

In view of the conflict between the decision below and that of other circuits on this question, and in view of the departure by the Court below from the principles enunciated by this Court in the *Gunning* and *Carpenters* cases, *supra*, this question requires resolution here.

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[16]Indeed, the Court recognized that the judgment against the unions could not have been sustained "on the bare conduct of the rank and file." (226 F.2d at 880; R. 1504; App. 80.)

III.

THE HOLDING OF THE COURT BELOW PERMITTING AN INCONSISTENT VERDICT TO STAND IS CONTRARY TO THE LAW AND CANNOT BE SUSTAINED.

The opinion of the Court below indicates that this point caused it the greatest of difficulty. The Court prefaced its discussion with the observation that it was "difficult to understand" how the jury, which found none of the individual defendants liable, could nonetheless have imposed liability upon the unions. (226 F. 2d at 881; R. 1505; App. p. 82.) And after a long discussion in which it (an appellate court) advanced a whole series of hypotheses by which the verdicts might conceivably be reconciled, none of which was presented to the jury at the trial, it concluded the opinion with the following remarkable observation:

> ". . . there was probably an inconsistency in the verdict; but, as we have held, it is a case where the jury had a right to be inconsistent. But finally we cannot say there was inconsistency." (226 F.2d at 884; R. 1510; App. p. 90.)

It is petitioners' contention that by affirming a judgment entered upon a verdict imposing liability on the principals while at the same time exonerating the "agents", the Court below decided the case in a manner which directly conflicts with the principles enunciated by this Court, and with decisions in other circuits, and that in so doing, the Court below so far departed from accepted legal principles as to require a review of its decision here.

The Court below recognized, as we have already seen, that petitioners' liability had to be based on a

jury finding "that some . . . persons in authority were responsible for what transpired . . ." (226 F.2d at 880; R. 1503; App. p. 80.) This was simply applying to this case the universally recognized doctrine of *respondeat superior.* But what the Court neglected to do was to apply the equally universally recognized converse of that doctrine: that where the liability of a principal is predicated upon the alleged tortious acts of its agents or employees, the exoneration of the latter necessarily requires the exoneration of the former.

This Court said many years ago:

> "It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity . . .
>
> "[I]f an act of an employee be lawful and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to his employer therefor." (*New Orleans & Northeastern RR. Co. v. Jopes,* 142 U.S. 18.)[17]

Lower federal tribunals have consistently applied the rule and have set aside judgments based upon inconsistent verdicts such as those returned here. *Dixie Ohio Express Co. v. Posten,* 170 F.2d 446 (5 Cir.); cf. *Portland Goldmining Co. v. Stratton's Inde-*

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[17]For a general statement of the rule, see 2 Am. Jur. 361, *Agency,* Section 455; 30 Am. Jur. 977, *Judgments,* Section 249; 35 Am. Jur. 962, *Master and Servant,* Section 534; and 53 Am. Jur. 726, *Trial,* Section 1049.

pendence, 158 F. 63 (8 Cir.); *King v. Stuart Motor Co.,* 52 F.S. 727 (N.D. Ga.); *Weekley v. Pennsylvania R. Co.,* 104 F.S. 899 (E.D. Ill.) This is equally the rule in Oregon, where the action here was tried. *Dare v. Boss,* 111 Or. 190, 224 P. 646.

The Court below, however, relied upon *Dunne v. United States,* 284 U.S. 390, and *Jayne v. Mason and Dixie Lines,* 124 F.2d 317 (2 Cir.), neither of which is applicable here.

The *Dunne* case was a criminal prosecution in which the single defendant was acquitted on counts of unlawfully possessing and selling liquor, but convicted on a count of maintaining a nuisance by keeping liquor for sale. Clearly, a criminal case cannot present the *respondeat superior* problems posed by the case at bar for no question of vicarious liability can exist in such a case. Furthermore, the verdicts there were not inconsistent, for one may maintain a nuisance without necessarily having the possession of, or selling, the liquor. Finally, as this Court itself pointed out (284 U.S. at 393), each count of the indictment must be regarded as a separate indictment; and if the defendant had been tried on separate indictments, an acquittal on any one of these three charges could not have been pleaded as *res judicata* of the others. The reverse is true in the civil cases where the prior exoneration of the agent requires, under the principles of *res judicata,* the dismissal of the action against the master. *King v. Stuart Motor Co.,* 52 F. Supp. 727 (N.D. Ga.); *Weekley v. Pennsylvania R. Co.,* 104 F.Supp. 899 (E.D. Ill.).

Nor did the *Jayne* case involve an inconsistency in verdicts such as we have here. There, a wife riding with her husband driver was permitted to recover damages against a third party defendant, despite a verdict of contributory negligence against her husband. Since, under the applicable local law, "his fault was not to be imputed [to her]" (124 F.2d at 319), and since, therefore, the rights and liabilities of the parties were governed by different legal principles, the results reached were not really inconsistent. In any case, no problem of imposing vicarious liability upon a principal for the alleged tortious acts of his agent was involved.

In the case at bar, however, the verdict in favor of the individual defendants necessarily required a verdict in favor of petitioners. This is so because the causes of action set up against all defendants, both the individuals and the unions, were identical. Petitioners' liability was, as it obviously had to be, predicated upon the doctrine of *respondeat superior*. There was no special defense open to the individuals not open to petitioners which would justify the results reached here.

As to the individual defendants the jury was instructed that there had to be a finding of a "conspiracy" before a verdict could be returned against them. (R. 1436-37.) But in exonerating the individuals, the jury found that the individuals did not conspire. Since the individuals did not conspire, then neither did the unions; for the unions could not conspire in the abstract, but only through and by means

of the individuals involved (as indeed the trial court charged [R. 1434]). Since the jury exonerated each and every alleged individual conspirator, there is no basis upon which it could have found that the unions "conspired" *in vacuo,* so to speak, to commit the tort.

The Court below has permitted a judgment of over $200,000 to stand against two trade unions, although the jury upon whose verdict that judgment was based has said that every single officer, "agent and representative" of those unions, and indeed, even their rank and file members, were not guilty of any tortious conduct. In reaching this result, the Court below, ignoring the rules of law usually applied in *respondeat superior* cases, has rendered a decision in conflict with principles enunciated by this and other federal Courts; it has also raised questions of importance respecting the application of Sections 301 and 303 of the Labor Management Relations Act of 1947. For these reasons the judgment below should be reviewed by this Court.

IV.

THE JUDGMENT CANNOT STAND BECAUSE RESPONDENT MADE NO EFFORT WHATSOEVER TO MINIMIZE ITS DAMAGES.

This Court has recognized the universally accepted principle of law that:

> ". . . a person seeking to recover damages for the wrongful act of another must do that which

a reasonable man would do under the circumstances to limit the amount of the damages." (*Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489.)[18]

On the record here it is indisputable that respondent failed to take any action at all to minimize its damages, although it had ample opportunity to do so.

The Court below conceded that the arguments advanced by petitioners on this phase of the case were "quite convincing" (226 F.2d at 880; R. 1504; App. p. 81), but was of the view that this was solely a jury question and that it would sustain any verdict the jury returned. However, a verdict for "the total amount" which respondent sought (226 F.2d at 880, n. 6; R. 1504, n. 6; App. p. 81, n. 6) cannot be permitted to stand in the face of conclusive evidence that respondent rejected all opportunities to reduce those damages.

We have already noted in the Statement, *supra*, that respondent could, without any loss to itself, have cancelled its contracts. One of its officers admitted that, had respondent chosen, it could have saved $142,000 by so doing. (R. 968.) Secondly, non-Hawaiian sources of pineapple, which, if used, would have eliminated practically all of the loss, were available to respondent (R. 1288) just as they were to other

[18] In *Warren v. Stoddart*, 105 U.S. 224, 229, it was said:
"... where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

nationally known fruit packers. (R. 1290.) Thirdly, alternative and less wasteful methods of using the fruit already on hand were also available to respondent. (R. 970-71, 1154-55.)

To sustain a verdict for the maximum amount of damages on such a record not only is contrary to the expressions of this Court as already noted, but conflicts directly with decisions of other Courts of Appeals. In *W. B. Moses & Sons v. Lockwood,* 295 F. 936 (D.C. Cir.), the Court of Appeals for the District of Columbia in reversing a judgment for plaintiff because of the failure to minimize damages, stated the reason for the rule:

> "Damages which may be avoided by doing what an ordinarily prudent man would do are not the direct or natural consequences of the defendant's wrong, since it is plaintiff's option to suffer them. In such a situation the plaintiff is damaged not by the defendant's act, but his own negligence or indifference to the consequences." (295 F. at 941.)

Other circuits have uniformly held the same way. *United States v. Brookridge Farm, Inc.,* 111 F.2d 461 (10 Cir.); *John S. Doane Co. v. Martin,* 164 F.2d 537 (1 Cir.);[19] *Texas Co. v. Christian,* 177 F.2d 759 (5 Cir.); *Pasquel v. Owen,* 186 F.2d 263 (8 Cir.).

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[19]In this case the Court said:

"Under the general rule of damages where one is injured or damaged by the wrongful act of another, he is bound to exercise reasonable care and diligence in mitigating the resulting damage. The Act [providing for veterans' reemployment] was intended for the benefit of the veteran and not to penalize the employer. There is nothing in it which indicates that the compensation for loss of wages shall not be mitigated

Indeed, the record now before this Court impels a finding that respondent not only failed to mitigate its damages, but permitted them to mount up for the purposes of this litigation. There is a striking parallel to the situation presented in *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55 (8 Cir.):

> "Arvel Blaylock's conduct in dealing with these shipments and making claims for loss of profits was obviously strategic, and stemmed from the defendant's refusal to accede to his demand that cans be shipped to the plaintiff free of freight, as well as from his interest in enhancing his alleged damages for the purposes of this lawsuit."

The affirmance of a judgment for the maximum amount of the damages sought, in the face of conclusive proof of the refusal to minimize those damages,[20] is contrary to the applicable rules of law and to the decisions of this and other federal courts, and raises a question of importance in connection with the proper measure of damages to be assessed in a suit under Sections 301 and 303 of the Act here involved. This Court should therefore undertake to review this case.

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and we see no hardship in placing this duty upon the veteran." (164 F.2d at 541.)

Similarly, Section 303 of the Labor Management Relations Act of 1947 was intended for the benefit of the employer and not to penalize the union, nor is there anything in it which indicates that the usual rule requiring mitigation of damages is not to apply.

[20]The passion and prejudice engendered against petitioners by the coupling of this statutory cause of action with the assault and battery suits (supra, p. 3) may explain, but not justify, the jury's verdict on this, as on the previous, point.

CONCLUSION.

For the foregoing reasons the writ of certiorari should issue and the judgment below should be reversed.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

San Francisco, California,
April 1956.

(Appendix Follows.)

Appendix

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Appendix

In the District Court of the United States for the District of Oregon

Raymond Curto, Plaintiff, vs. International Longshoremen's & Warehousemen's Union (CIO), etc., et al., Defendants.	No. 5104
Clarence Rosales, Plaintiff, vs. International Longshoremen's & Warehousemen's Union (CIO), etc., et al., Defendants.	No. 5105
Hawaiian Pineapple Company, Ltd., a corporation, Plaintiff, vs. International Longshoremen's & Warehousemen's Union (CIO), etc., et al., Defendants.	No. 5183

Opinion

JAMES ALGER FEE, Chief Judge:

At a trial before a single jury, three cases were presented which actually involved the trial of four major issues. Before trial a pretrial conference had been

held and a pretrial order adopted, which developed these issues and covered the whole field. On the cause of action by Hawaiian Pineapple Company, Ltd. (hereinafter designated as "Pineapple") against International Longshoremen's & Warehousemen's Union (hereinafter called "International") and International Longshoremen's & Warehousemen's Union, Local 8 (hereinafter called "Local"), there was a recovery of approximately two hundred thousand dollars. Upon the issues set up by Pineapple against International, Local and various individual longshoremen upon the ground of illegal interference with commerce between the mainland and Hawaii and with interstate transportation of the same cargo, brought about by a conspiracy to prevent the handling and movement of goods of Pineapple, there was a verdict for the defendants. In each of the actions by two truckers employed by Pineapple against various longshoremen for assault and battery, there was a verdict in damages and in punitive damages.

A number of special policemen were hired for the purpose of maintaining order and protecting the property of the port. The city of The Dalles, to the limits of which the port adjoins, employed these police. As a result of these and other activities of the members of Local, Pineapple was unable to have the cargo unloaded or transported to its subsidiary in California, although arrangements had been made with the Port of The Dalles, the Union Pacific Railroad, various trucking concerns and Goodat Crane Company for the unloading and transportation thereof.

The evidence tended to show the situation which will be hereinafter set out. Owing to a tie-up of transportation from Hawaii caused by the activity of International and affiliated local unions in the Territory, Pineapple, in order to convey a cargo worth approximately half a million dollars, which was intended ultimately for a processing plant owned by a subsidiary in California, had chartered the navy barge YFN624, which was loaded with facilities and by employees of Isleways, Ltd., a wholly owned subsidiary. This barge was towed across to the mainland by the ocean going tug "Ona," owned by Isleways. Upon arrival of the barge in the harbor of Tacoma, Washington, it was impossible to unload the cargo there, owing to resistance among labor groups in that port, engendered directly or indirectly by International. Thereafter the barge was turned over to a river tow boat by the Ona and was brought up the Columbia River ninety miles past Portland to The Dalles, Oregon, on September 24, 1949. Before its arrival there, Matt Meehan, who was a representative of International in the area, engaged in a series of conferences with officials of the Port of The Dalles, wherein he insisted that the cargo be not unloaded and that the facilities be not furnished to the barge. His address was truculent and aggressive. An Hawaiian, claimed to be a member of a local union there affiliated with International, was flown from the islands and arrived at The Dalles. There were meetings of the members of Local in its hall at Portland, Oregon, at which Meehan was present and took part in the discussion.

The next morning members of Local, to the number of from two hundred fifty to four hundred, proceeded in small groups by private cars to The Dalles, a distance of ninety miles. There members of Local and the Hawaiian formed a picket line outside of the dock of the Port of The Dalles, a municipal corporation.

After the picket line had been maintained for some days, certain of the longshoremen, hearing of the approach from outside the state, of teamsters belonging to a local teamsters union in California but who were engaged by Pineapple, met these employees at a point several miles from the dock, gave them an outline of conditions there and attempted to prevent their going further. However, two trucks went upon the dock in the morning and, when one of these had been loaded, the supervisor drove out and led two other trucks with drivers and helpers through the picket line and into the dock enclosure. Thereupon, in a riotous, threatening and violent manner, the longshoremen broke through the cordon of local police and rushed onto the dock. Some of them assaulted each of these employees of Pineapple. Two, in particular, were set upon by the longshoremen, who kicked them, beat them, and threatened them with death. The truck drivers were thus coerced into submission and, under threat of death or great bodily harm, promised not to interfere further. The four trucks returned to California empty.

The longshoremen, who rushed upon the dock at the time, proceeded to the dock's edge, having armed

themselves with various weapons which they were able to pick up,[1] attempted to damage a crane and threw some four hundred cases of pineapple into the Columbia River and attempted ineffectually to set the barge adrift. Thereafter, the longshoremen were recalled from the dock and gathered in a group outside the boundaries of the Port, where they were addressed by Meehan, who is said to have complimented them upon the measures which they had just taken,[2] but instructed them to remain outside the property. Thereupon, the picket line dispersed. But the streets of The Dalles were patrolled by gangs of men with a threatening attitude and belligerent manner, and the small community was thereby dominated. For some-

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[1]James A. Hunt (rancher and, at the time of the riot, a Port Commissioner) testified: "Q. (By Mr. Krause) Where were you during the riot, Mr. Hunt? A. I was down at the east end of Warehouse No. 1, where this pineapple was being or had been unloaded, some of it, there. • • • Q. Go ahead and tell us what you saw and heard at that time. A. I started walking on towards the office, meeting this bunch of men, and as they came toward me, why, some of them went on this side and some on the other. They paid no attention to me at all, apparently. Some of them had clubs and different things they were packing. Some of them I noticed reached down and grabbed something as they passed by, some stick or something. I don't know what it was. It looked like a stick. I heard some of them say, 'Now remember, fellows, no violence.' I also heard one or two say, 'Remember, don't touch anybody or damage any property of this port.' And then immediately I was through the gang."

[2]Earl Ayres (salesman for Sunset Motor Company) testified: "Q. (by Mr. Krause) What did you hear Mr. Meehan say to the men? A. He told them that they shouldn't have gone out onto the dock; that they were supposed to be peaceful pickets. Q. What else did he say? A. But he told them that they did a fine job. Q. Anything else? A. Well, he understood they were going to have a meeting that night and he wanted them to turn out for it."

thing like a month, similar conditions prevailed as those above described, while attempts were being made to obtain a solution. On October 19, the picket line was restored when employees of the Union Pacific Railroad spotted cars on the dock in an attempt to move part of the cargo by rail. As a result of such measures, Pineapple was not able to transport any of this cargo until after October 25. Eventually, when some concessions were made by the Port so that the unions could claim they were not entirely defeated, the picket line was withdrawn and the remaining pineapple was shipped to California. A number of the individuals who had gone on the dock were arrested, indicted and convicted of the crime of riot in the Circuit Court of the State of Oregon by pleading guilty to an indictment (here introduced in evidence) which charged, in part, that each of them "did then and there unlawfully, wilfully, routously and riotously trespass upon inclosed premises not their own, or either of them, namely, the premises of the Port of The Dalles; and did then and there unlawfully, routously, riotously and feloniously make an assault upon Don Higham, Eugene Hoard, Elvy Davis, Clarence Rosales and Raymond Curto, by then and there unlawfully and feloniously striking and beating them with said cargo hooks, iron bars, clubs and sticks."

Both Pineapple and defendants have filed motions for new trial affecting one or more of these cases. The grounds are so broad that complete review must be had to determine to the satisfaction of the Court the fairness of the judgments.

At pretrial conferences the Court directed the presence of all individual defendants as well as official representatives of Local and International, in accordance with normal custom of this Court.

The rule of the District of Oregon is that, except when excused by the Court, the litigants themselves must attend pretrial conferences, conducted in open court, with the court reporters present. The purpose is two-fold. First, to speed and make more accurate the issues thus simplified. Second, to require litigants to participate in the proceedings and convince them of the fairness and objectivity thereof. These aims have been given little prominence in the literature on pretrial conferences. The "conversation" or "shirt-sleeves" proceedings in the chambers of the judge would be of no value in realization of these aims. All phases of the litigation are conducted in open court. This was the method of the common law judges and lawyers. Return to the methods of oral pleading at common law is thus attained. Proceedings out of court bind no one. No distinction is made in this Court between proceedings before trial and the trial. Here there is a record. The advantages are many. The first purpose of these orders is to do away with the delays of common law and code pleading, to define the issues, both ultimate and evidentiary, to eliminate false issues and to guarantee that the controverted questions are in good faith contested. The second purpose is to have the individual litigant actually in open court before the judge and his adversaries,

where he hears the discussion of his conduct and claims and is in a position to correct factual errors.

Instead of the delays which were formerly necessary, legal and factual positions can be taken on the spot. The clients are in court and advice can be immediately obtained from them as to the facts. Admissions made in open court are judicial in nature and binding unless the Court permits modification where there is clear error. The greatest advantage is in public relations. Often modernly litigation is handled by organizations and lawyers which they select, while the individual whose interests are at stake is given no opportunity to observe the alignment or disposition of the cause. The tendency to use the individual as a pawn of some organization demigod has been heretofore noted. Important objectives are accomplished, therefore, by the rules: first, the litigant is made a part of the procedure; second, the proceeding not only appears fairer, it is fairer.

A striking exemplification of such factors appeared in the instant case. As above noted, criminal proceedings had been brought against various individual defendants in the state courts, and there had been pictures taken at the time of the invasion of the dock. The attorneys for the individuals naturally felt hesitant about making such important admissions on their own authority. But fifty-two defendants in open court admitted presence on the dock during that time. Pineapple accepted these statements and did not introduce proof that other defendants were on the dock. The issues were clarified by these admissions, and the

individual defendants recognized their responsibility as individuals and not as mere units of an aggregate, the union.

The pretrial order was drawn by the respective attorneys, based upon the admissions and the issues developed at the conference. This order, signed by the Court, states that it defines all issues and that the pleadings pass out of the case. No question can now be raised, therefore, as to the sufficiency of the complaint to state a cause of action, although a motion to dismiss was directed against it. However, in order that the position may be perfectly clear, the Court holds that the complaint states a cause of action against the unions under the Federal Labor Management Relations Act. It also states a cause of action against the unions and the individuals under the common law. Another question arose on the motion to quash service. This is also moot. The unions were properly served under the statute and the rule. The individuals were likewise properly served.

The pretrial orders in the three cases at bar were separately entered and contain certain agreed facts, contentions of the respective parties, issues of fact, issues of law, tabulation of exhibits and agreement that the cause be tried on the issues presented by each pretrial order alone. The causes were tried upon all issues involved at one time, since the states of fact were inextricably bound together. But separate verdicts and judgments were entered in each. In all of the proceedings, the attorneys for the defense cooperated as did the attorneys for plaintiffs. Indeed, with

issues hotly contested and in an explosive emotional atmosphere, the lawyers carried on the trial in accordance with the highest ethical concepts of the profession. The trial was fair to all concerned, and the rights of the defendants, collectively and individually, were fully protected.

The motions for new trial present these problems against this background of a fair trial. Defendant unions contend that the verdict against them was inconsistent with a verdict in favor of individual members of the union, who were named also as defendants. On the other hand, plaintiff Pineapple asked for a new trial on the ground that the Court failed to instruct the jury that the liability of the individuals stood on the same basic principles as that of the unions.

In answer to the contention of the unions, it may be said that there is no requirement that verdicts be logically consistent. It is only necessary that the particular verdict be upheld by the evidence under the rules of law.

The pretrial order holds the question of whether the unions, either alone or in combination, were liable under the applicable statute upon the facts.

The Court charged the jury that plaintiff Pineapple, in order to show liability of a defendant union, must prove by a preponderance of the evidence (1) that the activity affected commerce, (2) that a labor organization was involved, (3) that one or both unions (a) induced or encouraged (b) the employees of an

employer (c) to engage in a concerted refusal in the course of their employment (d) to use, transport or otherwise handle any goods or to perform any services in connection with the cargo of plaintiff Pineapple (4) that one of the objects of the inducement or encouragement was to force an employer or other person to cease doing business with any other person, and (5) that plaintiff Pineapple was injured as a direct and proximate result of such act.[3]

There was sufficient evidence upon each phase to sustain a verdict in favor of Pineapple and against either or both unions.

(1) It was clear and was agreed in the pretrial order that the situation here involved "an industry or activity affecting commerce."

(2) It was apparent and agreed in the pretrial order that labor organizations were involved in the controversy.

(3) (a) The record tended to show that the failure of various concerns in Tacoma to unload the barge was accomplished by pressure brought upon the officials and members of various unions by International. This feature was not included in the charge to the jury and was not important except that the incident threw light upon the method of operation and the objectives sought. As noted above, when information was received of the prospective docking at The Dalles, Meehan attempted to persuade the officials of the mu-

[3]So that there may be no misunderstanding, the Court's charge to the jury is set forth in its entirety in an appendix.

nicipality not to permit the use of the facilities by the barge. Again, the incident is not important except for the light it throws upon subsequent events because, as the Court charged, persuasion of an employer does not fall within the act.

It is shown without cavil that communications and brotherly compulsion were had with members and officials of the local teamsters union, members of which were employed by trucking firms operating in interstate commerce to and from The Dalles, with members and officers of the mechanics union whose members were employed by Goodat Crane Company, which owned a crane leased by Pineapple, to work at unloading the cargo with members and representatives of the Brotherhood, members of which were employed by the Union Pacific Railroad, an interstate rail carrier whose switching facilities ran into the Port and which could have been used in moving the pineapple. Finally, strong argument, appeals to class loyalty and implied threats were used by representatives of Local to persuade and induce the two teamster employees of Pineapple before they had arrived at the dock not to go there for the purpose of transporting the cargo.

It is true that a great deal of the persuasion and inducement was accompanied by threat, a tremendous show of potential force, and finally by actual violence. It is contended that violence is fact without juristic importance in an industrial dispute, since it must be dealt with by local authorities and has no relation to the problems of law. No form of inducement could

be more effective than threats of death, enforced by brandishment of a cargo hook and kicking and beating, the picket line, ominous and threatening, the violent break-through of the cordon of police and the surge onto private property, the smashing of cameras of newspaper men and the patrolling of the streets in numbers with threatening demeanor. The instant statute gives legal significance to any method of persuasion or inducement.[4] The Court prevented any undue emphasis upon this feature. But facts are facts and were here undeniable and for the more part undenied. Considering union tradition and feeling, the picket line itself was an inducement or persuasion to all employees of employers not to attempt to go on the dock to transport or handle the cargo.

(3) (b and c) The attempt was to have the employees of the various concerns which might have assisted in moving the cargo "to engage in a concerted refusal in the course of their employment" to handle the pineapple. Of course, as the Court pointed out to the jury, it was sufficient if the persuasion or inducement were made. It was not necessary that it be successful. There was evidence that the members

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[4]International Brotherhood v. National Labor Relations Board, 341 U.S. 694, 701-2: "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a 'threat of reprisal or force or promise of benefit.' Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8(b)(4) defining the proscribed objectives, because the use of 'restraint and coercion' for any purpose was prohibited in this whole field by § 8(b)(1)(A)."

of the Brotherhood, employed by the Union Pacific Railroad, concertedly did not attempt to switch cars for the pineapple. There was evidence that the teamsters, employed by truck lines, including the Portland-Pendleton Motor Transport Company, Consolidated Freightways and Oregon - California - Nevada Fast Freight, concertedly in each instance refused in the course of their employment to move the pineapple from the dock. Only one employee of Goodat Crane Company was engaged as an operator of the crane on the dock. He quit the job and refused to handle the cargo as a result. No other operator could be obtained from among the employees of the crane company to handle the crane or the cargo. This was evidence of a concerted refusal upon the part of the employees of Goodat Crane Company in the course of their employment. Several truck drivers, who were employees of Pineapple, left the dock and never returned after some of them had expressly agreed not to transport any of the cargo because of duress, of assaults, and of the threats above mentioned. The circumstances that the number of these truck drivers was not great was not significant if they took concerted action in the course of their employment.[8] In

[8]National Labor Relations Board v. International Rice Milling Co., Inc., 341 U.S. 665, does not hold that the number of employees who act or refuse to act is controlling, but whether they act in concert or merely as individuals. In International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board, 2 Cir., 181 F.2d 34, 37, the Court of Appeals, speaking through Judge Learned Hand, held that, when two carpenters in concert left the job on inducement of a union agent, there was sufficient concerted action within the purview of § 8(b)(4)(A) of the Act.

these many instances, the inducement or persuasion was highly successful, but the statute penalizes the inducement or persuasion whether the end is attained or the attempt to induce and persuade is futile.

(3) (d) The evidence was conclusive that the inducement or persuasion was directed toward the concerted refusal "to transport or otherwise handle" a specific cargo of pienapple. The record is replete with evidence that this was a direct boycott for the sole reason that the cargo originated in Hawaii.[6] There was constant reiteration by the unions, their representatives and members, of the phrase "hot cargo" or "hot pineapple." The handling or unloading and the transportation of this cargo were the point of the attack. So far as the record shows, there never was an attempt to interfere with the Port of The Dalles or the employees thereof while engaged in loading or unloading other products or freight except this. Every incident of this controversy hinged upon the handling and transporting of this cargo alone.

(4) The record also showed that it was one of the objects of the inducement and encouragement to force or require an employer to cease doing business with "any other person."[7]

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[6]There was a specious claim that there were other reasons. The Court submitted to the jury the issue of whether one of the purposes of the picketting was that proscribed by the statute. The statement in the text correctly indicates the content of the record. But, of course, this was not directly an issue in the case.

[7]§ 8(b)(4)(A), in substance, prohibits strikes or the inducement of work stoppages to compel one employer or person to cease handling the products of, or doing business with, another employer or person. Hence, it is the object of the union action

The object of the longshoremen was to isolate the cargo and prevent it from being handled by anyone and particularly transported. Therefore, it was one of the objects of the action to force or require the other persons and corporations to cease dealing with Pineapple and to force Pineapple to cease dealing with others. Not only was this the object of the compulsion, but it was effective. But the statute only requires that this be one of the objects. The evidence shows clearly the longshoremen aimed directly at this object. They did compel Pineapple to cease dealing with the railroad, the Port of The Dalles, the trucking lines, and the crane company. These measures also prevented the railroad and the trucking lines from dealing further with Pineapple after orders to move the cargo had been sent to them. Likewise, the Goodat Crane Company was required to cease renting its crane to Pineapple. It is true Pineapple bought the crane, but this circumstance did not prevent the cessation of dealing as an object of the unions, it also caused the cutting off of the leasing operations. Actually, complete stoppage of all business relations be-

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that is proscribed, regardless of the means adopted. The view of the United States Supreme Court is that it is not necessary that the proscribed object be the only object or even the principal object of the union's activities. National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 672; National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675, 689.

"It is not a defense that other motives may have entered into the action of the respondent [unions]." National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, 2 Cir., 178 F.2d 584, 586.

See also 31 Oregon Law Review 237; 2 Labor Law Journal 263, 680.

tween all these groups for a long period of time was accomplished.

(5) The jury found Pineapple was injured as a direct and proximate result of these acts, and the evidence gave complete support to the finding.

Thus it is patent that a cause of action under the Labor Management Act was stated as to each union, and the record shows that, as to each, there was substantial evidence to support a verdict. There is no inconsistency in the verdicts as to the unions and the individuals, who were freed from liability thereby.

It is true, there is a well established principle that a defendant cannot be held on the theory of respondeat superior for an act of an agent, if it be found as a fact that the agent did not do the act upon which it is attempted to impose liability. But this doctrine has no application here. Here the charge involving the individuals is a conspiracy to effect unlawful acts. The individuals may have done or assisted in doing the acts; the unions may have been found to have done the acts and thereby have incurred responsibility; but the mere fact that certain individuals who may have done certain acts were not found to have entered into a conspiracy with the union to do them is of no consequence. The liability would have been on entirely different grounds. Besides, as hereinafter noted, the acts of individuals for which a union might be responsible by either express authorization or express ratification would not bind other individuals. The unions could be held under the terms of the federal Labor Management Act. A cause of

action could not be stated or maintained against the individual defendants under that act, which applied only to organizations.[8] Therefore, as to them, the Court instructed the jury under the common law which the Court felt was applicable.[9] In so doing, the Court placed a somewhat greater burden upon Pineapple as to these individuals. Since there was a greater degree of proof required as to the individuals than as to the unions, there can be no inconsistency in the diverse findings.

Before dealing with defenses, it is well at this point to dispose of plaintiff Pineapple's motion for new trial upon the ground that the individual defendants could have been held upon the same ground and the same evidence as were the unions. Pineapple here repeats the same error as was made by the unions in contending that the verdicts were inconsistent.

It is true that the Court may not have accurately stated the elements of liability at common law as to the individuals. But no exceptions were taken to the

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[8]"It shall be an unfair labor practice for a labor organization or its agents * * *." 29 U.S.C.A. § 158(b). The provisions of this section limiting the right to strike are not directed against the individual worker but against concerted action of labor organizations and their agents. United States v. International Union, United Mine Workers of America, D.C., D.C., 89 F.Supp. 187; 64 Harvard Law Review 797, 808.

"* * * sec. 8(b) is not directed at the conduct of individual employees, but at the conduct of labor unions themselves." 31 Oregon Law Review 235.

"Activity on the part of individual employees—however unlawful or coercive it may be—is not an unfair labor practice. Only unions and their agents are subject to these provisions of the act." 2 Labor Law Journal 733.

[9]See Appendix for complete charge relating to liability of the individuals.

instructions upon this ground. The subject is highly complicated and the question of whether the state law or a common law adopted by the federal enactments applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the common law. This motion for new trial is therefore denied.

Since we have now an exact outline of the cause of action which the Court found in the complaint and the issues set up in the pretrial order as against the unions, certain of the defensive issues should now be considered to determine whether or not a new trial should be granted. Certain of these were not specified as grounds for new trial, but the record as a whole should be considered in disposition of these motions.

The Court did give further instructions upon the only point upon which there could be any requirement of proof by Pineapple. The Court positively required the jury to find affirmatively that the persons were acting within the scope of their authority before the unions or either of them could be held responsible for the acts of these "agents" and "representatives."[10] This, of course, is the test used in the instructions on the second trial of the United Brotherhood case.

Although the instruction thus conforms to the test of the Brotherhood case, there was no technical necessity that it do so. There was a fair treatment of the situation in the instructions. If anything, these were

[10]See Appendix.

more favorable to defendants, both individual and union, than the law required. It must again be noted this was a civil and not a criminal case, and the statute sets up standards foreign to those used in the Norris La Guardia Act.

The next point made by the unions is that the jury returned a verdict in the amount which Pineapple indicated was the exact amount of its monetary damage, and thus, as the unions claim, gave no consideration to minimizing damages. But the Court would have upheld a verdict in a much greater sum within the limits of the prayer of the complaint, if it had not been for an express disclaimer by Pineapple during the trial. The jury returned a lesser sum probably because they believed Pineapple would be satisfied to accept that amount. In view of the actions for which the unions were found liable, the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors. The Court agrees.

The point as to inconsistency is highlighted by another of the grounds for new trial. It is said that the Court fixed responsibility upon defendant unions by stating that certain individuals were agents, officers or representatives of one or the other of these defendants. But the judge is not an automation.

The evidence showed without cavil that Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of International and that Robert Baker and Wilfred Mackey were officers and Toby

Christiansen and Matt Meehan were agents and representatives of Local. There was no evidence to the contrary. There was no attempt to prove the opposite.

In support of this claim of the unions, there is cited United Brotherhood v. United States, 330 U.S. 395. The writer tried that case upon the return thereof to the District Court and gave instructions therein in accordance with the opinion cited. A conviction followed, and no appeal was taken. That case was a criminal prosecution to which it was held Section 6 of the Norris La Guardia Act applied. This is a civil suit for damages under the Taft-Hartley Act, which sets up its own tests of responsibility.[11]

The Court will now consider some of the other inherent defenses so that the attitude of defendant unions may be viewed in the light of the record as a whole. There was a claim that Local was attempting to get the work of unloading for its own members. This attempt to build up a controversy with the Port of The Dalles over the hours and wages of the employees handling this cargo highlights a very significant factor in this case in appraising the verdict. The jury considered this claim under the instructions and must have decided that one of the objects was that prescribed by the statute. Under the law, the attempt to get work for its own members would avail nothing in avoiding responsibility if the other elements which the statute condemns were present.[12] Besides,

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[11]29 U.S.C.A. § 185(b), (e).

[12]See Note 4.

it will be noted, the very aim which the unions say now motivated them is also proscribed.[12] The contention was specious and not in accord with the facts.

It stands out with naked clarity that International moved to boycott this cargo for the sole purpose of exerting pressure upon the public in Hawaii by isolating the islands from the continent. The record not only establishes the boycott and its purpose, but negatives all other reasonable postulates.

These unions had no quarrel with the tug "Ona" or the barge YFN624, which had been rented by Pineapple from the navy. By no possibility could this barge be considered as a portion of the plant of Pineapple with an ambulatory situs. Neither the Hawaiian Local nor the Portland Local 8 had any controversy with Pineapple or Isleways. Isleways had no controversy with its own employees, either here or in Hawaii. Concededly, the Hawaiian Local had no relations with Isleways. Nor did Local. It was not contended that any local affiliated with International had any direct relationship with Pineapple or Isleways. The dock in Hawaii from whence the barge sailed was picketed. Pineapple is not shown to have ever employed a member of Local or, for that matter, a member of any local affiliated with International. There was no attempt to organize the employees of Pineapple. Pineapple had no difficulty with its own employees. Local had no quarrel

[12] 29 U.S.C.A. § 158(b)(4)(D) expressly outlaws jurisdictional strikes.

with the Port of The Dalles or its employees until the officers thereof permitted the barge to be tied there and an attempt made to unload.

Then it is contended in extenuation that there was picketing in the islands of a Hawaiian local against some alleged subsidiary of Castle and Cook, with which latter Pineapple is claimed to have been affiliated by interlocking directorate and financial interrelation. No administrative board or court has held such feature constitutes a valid ground for picketing. There is shown no community of interest among the corporations on the one hand or the locals on the other. Harry Bridges, President of International, testified that, under the agreement of the latter with certain shipowners, collusive picket lines, jurisdictional picket lines, hot cargo picket lines and demonstration picket lines were, as he expressed it, "illegal." That agreement was, of course, not binding upon either Pineapple or defendants, since there was no claim or offer to prove that Pineapple, Isleways, or even Castle and Cook were signatories or in anywise connected therewith. But this expression of opinion by one most intimately concerned is extremely persuasive since the law, common and statutory, actually does proscribe such activities. Inasmuch as there was no proof to show either that the Hawaiian local or Local 8 had any connection with either the barge or the tug or had any connection with Pineapple or Isleways or with Castle and Cook or indeed had any connection with the cargo, the picket line was neither legitimate nor

bona fide under the terms of the agreement made by International. Likewise, it was proscribed by law.[14]

There was no offer of any proof as to whether there was a strike or even picketing. Since no such proof was offered, there was no legal justification for a member of that local to attempt to boycott a cargo of Pineapple, who was not his employer and with which neither he nor his union had any dispute. The Court rejected an offer to prove the claimed relation between Castle and Cook and Pineapple, for, even if the claim be conceded, it gave neither the member of the Hawaiian local nor the unions here involved standing.[15]

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[14]Bridges attempted to justify the instant situation on the ground that the Hawaiian Local was striking over wages and that the barge was a "struck ship," but the evidence shows this latter statement was not true. He specifically admits that this ground was one of the motivating factors of the picket line. Since the evidence then showed this, and since such object was illegal, whatever may have been some other motive, his statement supports the verdict.

[15]A discussion of the "Ally" doctrine is helpful in disposing of this contention. During the course of congressional debate on the act, Senator Taft stated, "This provision [§ 8(b)(4)(A)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 Congressional Record 4198 (1947). Based on this statement of legislative intent, some cases have tried to limit § 8(b)(4)(A) by holding that a boycott may legally be directed against a secondary employer if he is not a neutral party to the dispute between the primary employer and the union. Such a limitation is not suggested by the language of the act but, say the theorists, "was read into the statute in order to avoid going beyond the purpose of protecting innocent third party employers in a labor dispute." 64 Harvard Law Review 802; 31 Oregon Law Review 235.
The words of the statute, "any employer" and "any other person," seem so plain and unambiguous that under the plain-meaning rule a resort to legislative intent is unwarranted and the pitfalls of delineating neutrality should be by-passed. Since all those who regularly do business with an employer are interested financially in the outcome of his labor disputes, it is extremely difficult

International, according to its own reiterated position, had no authority over the Hawaiian local, and the

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to determine how disinterested an employer need be to receive the protection of the act under the above rationale.
The Supreme Court has not yet ruled on this doctrine nor attempted delineation. (National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 669, by way of dictum, mentions the term "neutral" but makes no attempt to define it.) The cases which have considered this doctrine have used it quite sparingly. Thus far, the National Labor Relations Board has denied protection on the ground of non-neutrality only in cases like the Irwin-Lyons case (87 N.L.R.B., No. 9), where the primary and secondary enterprises were under the same ownership and control and engaged in integrated operations; i.e., substantially the same enterprise. See 64 Harvard Law Review 802, 2 Labor Law Journal 268. In practically all the cases in which non-neutrality has been urged, the National Labor Relations Board has found neutrality. The business relationship between a contractor and subcontractor in the construction industry will not cause non-neutrality. (Gould and Preisner, 82 N.L.R.B. 1195.) The Supreme Court apparently follows this view. (See National Labor Relations Board v. Denver Building & Construction Trade Co., 341 U.S. 675.) Likewise, the National Labor Relations Board reached the same result concerning relationships between a contractor and his subcontractors in other industries (Climax Machinery Co., 86 N.L.R.B. 1243), between a liquor distiller and his wholesale distributions (Schenley Distillers Corp., 78 N.L.R.B. 504), and between a manufacturer of prefabricated houses and the builder who purchases and erects them for sale (Wadsworth Building Co., 81 N.L.R.B. 802).
The leading district court opinion finding non-neutrality is that of the Southern District of New York, by Judge Rifkind, in Douds v. Metropolitan Federation of Architects, 75 F.Supp. 672, which held that, when a struck manufacturer subcontracts his work to his own subsidiary and sends his own foremen to supervise the subcontractor's employees, picketing the subcontractor may not be illegal since the parties may not be "doing business" with each other within the meaning of the act. (See 50 Michigan Law Review 318.) The Court of Appeals for the Second Circuit apparently is not too fond of this rationale, for it has narrowed Judge Rikind's test down to identity of ownership and management and in most cases found neutrality. See National Labor Relations Board v. Wine, Liquor and Distillery Workers Union, 2 Cir., 178 F.2d 584; 2 Labor Law Journal 737.
In discussing this issue, Judge Learned Hand, in International Brotherhood of Electrical Workers Local 501 v. National Labor Relations Board, 2 Cir., 181 F.2d 34, said: "In short, is a sec-

Portland local, which is approximately twenty-five hundred miles away, had no ground to boycott a product[16] with which it had no connection by employment or handling against an employer with whom none had had any relation. No decided controversy, whether by administrative board or court, holds there is any basis for protected concerted action upon the facts claimed here.

It is axiomatic that in American society labor unions are highly favored. The statutes firmly found the right to bargain collectively for wages, hours and conditions of employment. The Congress and the Executive and

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ondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase, 'doing business', would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do."

Hence there is considerable doubt that the "ally doctrine" imposes a real limitation on § 8(b)(4)(A). The test seems to boil down to—are the two enterprises the same? If they are, then the terms of the statute "doing business with any other person" are not met. In the instant case, Castle and Cook, Isleways, and Hawaiian Pineapple Company are different enterprises and the terms of the statute are fulfilled.

[16] "Product boycotts are within the ban of 8(b)(4)(A)." Judge Hulbert in Douds v. Confectionery and Tobacco Jobbers Employees' Union Local 1175, etc., 85 F.Supp. 191, 196. See also 2 Labor Law Journal 269; Wadsworth Building Company, Inc., et al., 81 N.L.R.B. 802.

the Courts recognize the strike as a legitimate device to publicize grievances and to exert pressure. The key purpose of recognition of this outstanding position accorded to labor is to prevent obstruction of interstate and foreign commerce. All of the federal labor legislation requires in positive and explicit terms that anything which has a tendency to prevent the free flow of goods between states and territories is to be eliminated. If a labor group is able to boycott goods and prevent the further transportation thereof, simply because these originated in Hawaii, important effects upon the public might be accomplished. The proscription might accomplish the results of a "general strike" so far as Hawaii is concerned. This might well be likened to the outlawry of an individual in middle-age England. Or, more appropriately, to the ban imposed upon a kingdom because of the recalcitrance of a ruler. In either the people suffer. If this attempt were successful, the foreign policy of the United States could be seriously affected by the union, in thus isolating the islands of our sea frontier.

The concern is not primarily the interest of either the unions, longshoremen or industry, the private parties who were before the Court. There is a paramount unity of interest which over-rides all other considerations. It was to the interest of the longshoremen as well as the industry and each individual citizen of the general public that commerce between Hawaii and the mainland should be uninterrupted by the selfish interests or demands of either the industry or the unions.

The public interest is here paramount and not the selfish interest of the economic giants in the conflict. Freedom of ocean transportation cannot be denied to anyone with safety to the nation. The specious plea that some laborer or group of laborers in Hawaii or Maine suffers discrimination cannot halt commerce between Oregon and California. The use of the weapons provided for economic bargaining cannot be made with impunity against the public itself. This boycott was against the public interest, as the jury obviously found.

Interference with the transportation of goods between a territory and the states or from one state to another is a direct burden upon and obstruction of interstate commerce. If such an obstruction occurs, it is illegal.[17] If it occurs in the manner proscribed by the statute, liability is created. The Court carefully laid down the law as enacted by Congress.[18] The considerations which have just above been adverted to show that the result was morally sound and in accordance with the public interest as well as technically exact.

There is one additional point in the motions of defendants for new trial in the separate cases for assault and battery. It is said that the wide disparity between the proof of special damages and the compensatory and punitive damages allowed indicates passion and

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[17]Waterfront Employees of Portland, et al. v. C.I.O., 1 C.C.H. Lab. Cas. 386; M & M Wood Working Co. v. Plywood & Veneer Workers Local, etc., 1 C.C.H. Lab. Cas. 389.

[18]See Appendix.

prejudice on the part of the jury in each of these cases. Suffice it to say, the damages allowed are not, in the opinion of the Court, excessive. Where the evidence shows, as here, that two truckers were set upon by approximately fifty men, jerked out of a truck, threatened with death by means of a cargo hook, and so kicked and beaten that they were injured, this Court would, in judicial calm, sustain verdicts much higher, whether compensatory or punitive. The union card does not entitle any defendant to immunity for the results of acts of physical violence. The jury spoke for the public here. The result is reasonable and must be sustained.

The motions for new trial by plaintiff Pineapple and defendants, respectively, are denied.

Appropriate orders may be prepared.

APPENDIX

Instructions of The Court

The Court: Ladies and Gentlemen of the Jury, we have now arrived at the final act in these three cases which are submitted to you for trial. I know that you have paid very careful attention to the evidence throughout this rather long trial and that you have approached the thing in an entirely fair and impartial manner. It is with entire confidence that the Court submits to you for determination the questions of fact in this case.

You have heard the arguments of counsel in the cases on both sides. As I said before, counsel are not witnesses. They are simply advocates. They have a right, and it is their duty, to urge the cause of their clients and to suggest to you the things which they believe can be found from the evidence. You may, of course, accept such inferences and deductions as they suggest to you, but you are not bound to. You are the sole and exclusive judges of the facts in this case and of the credibility of each and all of the witnesses. This is a function with which the Judge does not attempt to interfere. The responsibility for the decision of the facts is yours.

It is true that a United States Judge may comment upon the evidence and give you his viewpoint as to the credibility of the witnesses. However, in this case the Judge does not intend to exercise that function. This is a question of fact and should be decided by you as a question of fact. If any of you should have any idea as to how I should decide the

facts in any of these three cases, I charge you explicitly that you need not pay any attention to what my attitude might be, because it is my intention to commit the facts to you solely and exclusively for decision.

It is my responsibility to lay down for you the rules of law, and if I tell you a certain thing is a rule of law then that is binding upon you, because there are other tribunals which are set up to take care of any mistakes I happen to make. I don't think I will make any, but there are courts for correction of my mistakes on the law, so you don't need to worry about that. Even if you don't agree with the law that I lay down, it is your duty to follow it.

You must, of course, reach your verdict on the basis of the evidence that has been produced before you and in the light of the law as given to you by the Judge. You are sworn under oath to try these cases upon the law and the evidence. This excludes any consideration of sympathy, prejudice, passion or bias that you may have against or for any litigant, either plaintiff or defendant. Therefore, you will not permit any such considerations for or against any litigant to enter your deliberations at all, nor will you deal on the basis of speculation or chance, but solely be guided by the evidence which has been produced in this courtroom under the rules of law as the Court shall give them to you.

There will be presented for your consideration three different civil actions for damages. The first of these in Civil 5183, Hawaiian Pineapple Com-

pany, plaintiff, against International Longshoremen's & Warehousemen's Union and International Longshoremen's & Warehousemen's Union, Local 8, and various individuals also named as defendants therein. This action is brought by the Hawaiian Pineapple Company, Ltd., for the purpose of recovering damages alleged to have been caused to its business and property by the alleged acts of the union or unions and of the individual defendants.

Now, as a matter of timesaving throughout these instructions I shall use the single word "International" to designate the general union in which the various locals are affiliated and which has its headquarters in San Francisco. Throughout the instructions, likewise, I shall designate the Portland local union affiliated with the International as Local 8.

The second action which will be submitted to you for determination is Civil 5104, which was brought by Raymond Curto as plaintiff against Matt Meehan and some forty other individuals named as defendants. This action is to recover damages for injuries claimed to have been sustained by Curto by reason of alleged activities of the defendants in willfully beating and injuring him at The Dalles, Oregon, and disabling him from carrying on his occupation.

The third action is Civil No. 5105, and is brought by Clarence Rosales as plaintiff against Matt Meehan and forty other named individuals as defendants. This action is to recover damages for injuries claimed to have been sustained by Plaintiff Rosales by reason of the alleged activities of defendants

in willfully beating and injuring him at The Dalles, Oregon, and disabling him from carrying on his occupation.

Although all of the evidence is for your consideration in each of these three cases, the cases themselves are separate, depending for their solution upon separate legal principles. I will instruct you separately as to each of these cases, although I will join the two personal injury cases for convenience. You will be asked to return a separate verdict in each one of the three cases.

Now, there are some other general ideas, which I wish to give you with regard to each of the three cases. In each of the three cases the particular plaintiff has the burden of convincing you by a fair preponderance of the evidence that he has proved his case as to each material contention. If you are so convinced, you may return a verdict in favor of each plaintiff who so convinces you and against those defendants only whom you find liable according to the instructions. If, in any case, a plaintiff fails to prove any material contention, then that case must fail as against the defendant or defendants involved in the contention.

A fair preponderance of the evidence is not determined by counting the number of witnesses on each side, but by weighing in your minds the strength of the evidence produced on either side in the light of the credibility you give the witnesses. In determining whether a preponderance exists, you must consider all the circumstances as the nature of the case per-

mits, bringing to bear upon them the experiences and observations of life and weighing them with prudence and care.

Now, there is one factor that runs throughout the cases, and I shall take that up because that is a question of admissions. With respect to all three cases also the indictment and sentence, Exhibit 26, was admitted in relation to the individual defendants who pleaded therein, and is in the nature of a personal admission. It is not evidence against any other person or union in the case. However, if you find the acts were done by an individual defendant, you may consider such acts in connection with the other defendants, subject to the other instructions in the case.

Now, also, there runs a question of admissions of agents throughout all these cases. Admissions of agents, made while engaged in the business of their principal and within the scope of their authority, with reference to matters in which they are properly engaged for their principal, is evidence against their principal. However, all oral admissions reported by another witness in court should be viewed with care. The person speaking may not have clearly expressed his meaning or the witness may have misunderstood him.

The Court will now proceed to outline the case of Hawaiian Pineapple Company, Ltd., vs. International Longshoremen's & Warehousemen's Union and International Longshoremen's & Warehousemen's Union, Local No. 8.

The primary liability of either the International or Local 8 defends upon the existence of a duty owed by the International or Local 8, or either or both of them, to the plaintiff. The duty of each of these unions to the plaintiff is established by certain laws passed by the Congress of the United States. Trade unionism is favored in the United States. Public opinion is in its favor, and so far as these union organizations are concerned any person has a right to join and go along with them. The question in this case arises upon the question of whether there has been a lawful endeavor on the part of the unions.

The primary purpose of the laws which relate to these matters is to maintain the full flow of commerce, to proscribe practices which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce and to prevent action by employers or employes which has the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce, while at the same time fully protecting the rights of employes to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, and also to protect the right of the employe to refrain from any or all such activity.

The law gives a right of recovery against a labor union, which represents employes in an industry affecting commerce, to anyone who has been injured

in his business or property thereby under certain circumstances and limitations. This right is given where such a labor organization in such an industry induces or encourages the employes of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities or to perform any services in connection therewith. These acts are actionable only where one of the objects of the incitement or encouragement is to force or require any person to cease doing business with any other person.

The words "industry affecting commerce," which the Court has used above, mean any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

The word "commerce" includes trade, traffic, commerce or transportation among the several states or between any territory and any state, and especially between the Territory of Hawaii and the States of Oregon, Washington and California.

In this connection, the definition of "employer" for the purpose of these instructions includes neither the Port of The Dalles nor the Union Pacific Railroad. The definition of "person" does not include the Port of The Dalles.

The term "employe" includes any employe, and shall not be limited to the employes of a particular employer.

The Hawaiian Pineapple Company, Ltd., the Portland-Pendleton Motor Transport Company, Consoli-

dated Freightways, Oregon-California-Nevada Fast Freight, and the Goodat Crane Company are each employers as the word is used in the law and in these instructions. The Hawaiian Pineapple Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight, Goodat Crane Company and the Union Pacific Railroad Company are all and each a person as that term is used in the law and in these instructions.

The plaintiff Hawaiian Pineapple Company, since we are speaking of that case, in order to show liability upon the part of any defendant labor union, must prove by a preponderance of the evidence:

First, that the activity then being carried on affected commerce;

Second, that a labor organization was involved;

Third, that one or both of the labor organizations named as defendants here induced or encouraged the employes of an employer to engage in a concerted refusal in the course of their employment to use, transport or otherwise handle any goods, articles, materials or commodities, or to perform any services in connection with the cargo herein involved;

Fourth, that one of the objects of such inducement or encouragement, if there was any, was to force or require some employer or some other person to cease doing business with any other person;

Fifth, that the plaintiff was injured in business or property as a direct and proximate result of such acts.

Now we shall turn to find what are the claims of plaintiff, the Hawaiian Pineapple Company, in order that we shall find what the basis of the contention is.

Plaintiff in the Hawaiian Pineapple case claims that, having no labor trouble with its own employes, it loaded a barge with pineapple in Hawaii and towed it toward the United States; that the barge eventually went to The Dalles; that the plaintiff, Hawaiian Pineapple Company, Ltd., made arrangements for the handling and transportation of the cargo of pineapple with a crane company and with an interstate railroad company and interstate trucking companies in commerce. Plaintiff claims that the International, acting through its officers and agents and Local 8, and the defendant Local 8, acting through its officers and agents, combined to prevent the unloading and transportation of the cargo in interstate commerce, and that the unions and each of them induced and encouraged employes of various employers to engage in a concerted refusal to transport, handle or work on or perform any services in connection with the cargo of pineapple, with an object of forcing plaintiff, Hawaiian Pineapple Company, to cease doing business with certain employers and certain other persons and of forcing and requiring certain employers to cease doing business or dealing with the plaintiff Hawaiian Pineapple Company. That the defendant unions, the International and Local 8, accomplished said inducement with those objects by: Calling on the employers to persuade the employes not to handle or to haul the cargo of pineapple; call-

on officials and representatives of labor unions, representing employes of the interstate trucking concerns and of the crane company, to engage in a concerted refusal to handle the goods; maintaining a picket line at the Port of The Dalles; by a forcible and violent overrunning of the terminal of the Port of The Dalles and staging a riot and causing damage to employes and property of the Hawaiian Pineapple Company; after the riot patrolling the streets of The Dalles on September 29th; resuming picketing on October 20th to October 27th; and continuing inducement and encouragement of employes of plaintiff and other employes after October 27th.

Plaintiff claims that as a direct and proximate result of these actions the plaintiff, Hawaiian Pineapple Company, Ltd., was damaged in business and property.

Now that is one side of the case. That is the Hawaiian Pineapple Company's side. The defendant unions and the individual defendants deny all these claims and allegations of the plaintiff above set out, and the defendants contend no conspiracy of any kind was entered into or combination by or between any of the defendants here for such purposes or any purpose.

That the Hawaiian Pineapple Company and Isleways are wholly owned subsidiaries and alter egos of Castle & Cooke, Ltd., Theodore David, Alexander & Baldwin and Matson Navigation Company and, as such, any strike referred to in said cause of action

was a primary strike and not violative of any section of the Taft-Hartley Act or of any general or common law of the United States.

That any acts done and performed by said defendants were done and performed for the purpose of achieving legitimate ends of collective bargaining and the legitimate ends and purposes of trade unionism, namely, the prevention of the breaking down of wages and working conditions of the membership of Defendant Local 8.

That the defendant Matt Meehan was at no time the agent or representative of the defendant International in and about the matters as set forth in plaintiff's contentions.

That neither the defendant Local 8 nor any of said individually named defendants were the officers, agents or representatives of said International in relation to any of the matters set forth in the plaintiff's contentions.

That each and all of the defendants deny that they either singly or collectively or in concert with each other did or performed any of the acts or things set forth in plaintiff's contentions.

That the Port of The Dalles is not "an employer" or "other person."

Defendants contend plaintiff could have purchased ample pineapple from other sources without money loss and thereby minimized damages.

Defendants contend that plaintiff could have refrained and refused to buy large quantities of fresh

fruit in 1949 under its contracts to purchase fresh fruit from growers thereof without money loss and thereby minimize their damages.

Now, that sets up the contentions of the parties, and the Court will now state to you the conditions of recovery. You will remember that the plaintiff Hawaiian Pineapple Company must prove its case by a preponderance of the evidence in order to recover and must prove all of the necessary contentions and allegations.

If the plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or encouraged the employes of plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object of forcing or requiring plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof

plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described.

Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight, or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff's cargo or with the object of forcing or requiring either Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover.

Now, you must remember that in connection with the Goodat Crane Company on September 27th, 1949 —that is the day before the riot—Hawaiian Pineapple Company purchased the crane from the Goodat Crane Company, and therefore any inducement or encouragement of the employes of Goodat Crane Company must have occurred prior to the transfer of the

crane, and with the intent above described, to fall within this instruction.

If you find that the employes of an employer did not by concerted action in the course of their employment refuse to transport commodities or perform services, but by a preponderance of the evidence you find that any defendant union is proved to have induced or encouraged them to do so with the intent above outlined, you still might find against that defendant or defendants on that issue.

In other words, it is not the actual taking of concerted action in the course of their employment by the employes of any employer, but it is the encouragement and inducement with the proscribed intent which the legislation of the Congress denounces.

You may consider whether or not the conversations which were held by certain individuals of the longshoremen with the truck drivers employed by the Hawaiian Pineapple Company were for the purpose of inducing or encouraging said employes of the plaintiff Hawaiian Pineapple Company or any employe of any other employer to take concerted action in the course of their employment to refuse to perform any services as to the pineapple. You may consider that also to determine whether it was an object of any inducement or encouragement which you may find to force any person to cease dealing with the Hawaiian Pineapple Company. If so, you will in connection with the other instructions which I have given you determine whether that action was illegal or actionable. And that would be true whether such in-

dividuals advised the truck drivers of the fact either that the pineapple was "hot," as the phrase is understood in this proceeding, or that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen, provided, of course, that you find the acts were done as I have set forth in the previous instructions and that the purpose was as outlined.

The inducement or encouragement, as mentioned in these instructions before, need not be by conversation or pressure upon the particular employes involved, since it may be accomplished by any effective means, such as the the persuasion of the officers and agents of the union to which such employes belong, or by threats of reprisal, however communicated, or by violence against other persons or against the employes of another employer; in other words, any means which would accomplish the inducement or encouragement. And in that connection you may take into consideration the testimony and other evidence with regard to conversations held by certain persons with the officers and agents of other unions, such as the Teamsters' Union, or the other unions outside of the unions in suit, who had something to say to the employes of a particular employer. You may consider all the evidence in that regard to see whether or not inducement and encouragement was extended.

The inducement or encouragement must be exercised as to the employes of a particular employer to take concerted action in the course of their employment in the manner above described, but one of the

objects of such inducement or encouragement, if offered to all the members of the general union or class of employes, must be to cause the interruption of normal business relationships between two separate employers before there can be any liability on either of the defendant unions. Further, pressure brought directly upon an employer alone, without the purpose of inducing the employes of the particular employer to take concerted action in the course of their employment, would not establish any basis for liability.

One of the objects of the inducement or encouragement must be to force a particular person to cease dealing with another person. Therefore, if you find that the persons in question had never dealt with each other, the conditions for recovery would not be fullfilled, because the law requires that the object be to force a particular person to cease dealing with another person.

If an object of inducement or encouragement to employes of an employer, as above defined, were to force one person to cease dealing with another person, then it would be immaterial whether the person against whom the force was directed actually ceased then or thereafter to deal with such other person. The object or intent of the inducement by the union, if you find any, is material and must be established, as you have been heretofore instructed.

If you find that neither of the defendant unions induced or encouraged the employes of an employer, as plaintiff claims, or that such inducement or en-

couragement was solely for the purpose of concerted activity on account of wages, hours or conditions of employment, as the defendants claim, or to obtain jobs for themselves, then your verdict should be for all of the defendants.

However, if you find that the plaintiff, by a preponderance of the evidence, has proved that the defendants did the acts of inducement or encouragement as claimed by plaintiff, and that one of the objects was to force one person to cease dealing with another person, as above set out and as claimed by the plaintiff, and that damage to business or property of the plaintiff directly resulted, they you may consider the liability of the individual defendants.

If you find one of the objects of any inducement or encouragement was to force any person to cease doing business with any other person, it would make no difference that the International or Local 8 or the persons whom you find, if you do, were inducing or encouraging, had other objects therein, such as conducting a strike on account of wages, hours or conditions of employment of employes of the Port of The Dalles, or such as forcing or requiring the Port of The Dalles to assign the particular work of unloading the barge to employes of Local 8 rather than to employes in another class. In other words, the forcing of a person to cease doing business with another person, if that be one of the objects of the inducement or encouragement, would be sufficient, even though there might be other legitimate objects in mind.

Even if any acts done or performed by any defendant union were for the purpose of achieving legitimate ends of collective bargaining and the legitimate ends and purposes of trade unionism, such as the prevention of the breaking down of wages and working conditions of Local 8, still, if a defendant union or two or more defendant unions in concert induced or encouraged employes of any employer, in restraint of trade and commerce, as above described, but another object thereof was to force any person to cease dealing with Hawaiian Pineapple Company, then the plaintiff should prevail on that issue.

Now, there is one factor in this case which has not been much discussed, but on which I will give you a few things now. There were certain arguments made upon the matter as to which I think this is pertinent, and also there were certain contentions upon which it bears.

The presence of a member of the Hawaiian Local at the entrance of the property of the Port of The Dalles, whatever his purpose or that of his local, furnished no justification or excuse for any action or for picketing or for inducement or encouragement of other persons or employes by the International or Local 8 or any members thereof.

If you find that a member from the Hawaiian Local had a legitimate reason for his presence at the entrance of the Port of The Dalles, that would furnish no reason, justification or excuse for any action you may find by the International, Local 8, or any member thereof.

You may, however, consider the presence of the member of Hawaiian local to determine whether either of the unions had any part therein, and you may also take it into consideration to determine whether one of the objects of any encouragement or inducement of other employes was to force any persons to cease doing business with any other person and to prevent the unloading of the cargo and the transportation thereof in interstate commerce.

There is no evidence in this case that this was a primary strike as far as the Hawaiian local was concerned.

There is no evidence in this case that the Hawiian Pineapple Company had any strike of its own employes, or that it was picketed, or that there was any difficulty at the time that the barge left Hawaii.

Now then, we deal with the questions of agency, because that is an important question in this case. The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan were agents and representatives of defendant Local 8. It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment.

An association such as the International or Local 8 can act only through its officers and agents. It is liable for the unlawful acts of its officials when they are acting within the course and scope of their employment. It is liable even though such unlawful acts were not authorized or were forbidden if they were done to advance the interests of the principal and were within the scope of their employment. To decide whether these acts were within the course and scope of the employment of the particular official, you must determine that the acts were done when the official was pursuing the business of the union who was his particular principal, and that the union could have foreseen that such unlawful acts might occur in the performance of such employment.

Either the International or Local 8 would be liable if any unlawful acts were directly authorized by it or if they were ratified by it after having knowledge of the acts done on its behalf. In determining whether such acts were authorized or ratified you may consider all the circumstances under which they were done, together with the actions of each union, the International and Local 8 before and after the occurrences at The Dalles.

Plaintiff is required to prove the existence of an agency relationship as to each officer or agent involved and the existence and extent of the authority. Unsworn declarations or statements of the supposed agent himself as to the existence of agency and the extent of authority is not proof thereof. However, agency and extent of authority may be proven either

by direct or indirect proof. Direct proof consists of the documents or acts by which the agent was appointed. Indirect proof of agency, and particularly of the scope of employment, may be established by evidence of other facts and circumstances from which it may be inferred.

Even if there is no prior authorization of an agent, the principal would still be liable if, with full knowledge of the nature and character of the acts done by the agent on behalf of the principal, and with the intent to adopt them, the principal subsequently ratifies, approves or accepts the benefit of such agency and the acts of the agent. If, therefore, you find there was subsequent conduct relating to the agency or acts of any agent by the International after September 28, 1949, but there was no intent to ratify or adopt such acts, that would not necessarily amount to ratification. However, the question of scope of authority and of authorization and ratification are questions for you to decide as matters of fact.

The International at any time had the full right, ability, authority and power to limit the authority of any agent, even though he remained on the payroll of the International. It also had the power to discharge him. The question is one of fact, as far as this case is concerned, as to whether in the things he is proven to have done he was authorized, or that the matters fell within the general scope of his agency, or whether the International expressly ratified his acts thereafter with the intention to do so and with knowledge of the facts.

If you find the International, through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, combined with a common purpose to induce the employes of any employer in the course of their employment to refuse to handle the cargo, with the object of forcing any person to cease dealing with any other person, then you may consider all the evidence to determine whether the acts were done in concert in accordance with the common purpose and to effectuate a common design and, if damage to property or business resulted directly and proximately therefrom, you may consider whether the International or Local 8, or either of them, was responsible for the damage and injury.

If you find neither of the defendant unions is liable under the instructions which I have just given you, then without further consideration you will enter a verdict in this case where Hawaiian Pineapple Company is plaintiff in favor of all the defendants and against the plaintiff.

Now, I want to mark that point. If you find under these instructions that I have just given you that neither of these unions is liable, neither the International nor the local, then you shall promptly enter a verdict in favor of all the defendants and against the plaintiff. That includes the individuals and everyone else.

Now if you have, however, found liability under these instructions as to one or both unions, the International and local, then you may consider the

liability of the individual defendants. In other words, you have to find the unions or one of them liable under the first part of the instructions before you can consider any individuals.

As to the liability of the individuals, the plaintiff makes further contentions, and only if you have found that one or both unions are responsible will you consider the claims against the individuals in conjunction with the unions.

The plaintiff Hawaiian Pineapple Company in this regard claims that the unions and the individual defendants conspired to boycott the cargo of pineapple to prevent plaintiff from unloading the cargo of pineapple and from having the same shipped in interstate commerce and to injure and damage the business and property of plaintiff and to induce and encourage employes of employers to engage in a concerted refusal in the course of their employment to transport, handle, work on or perform any services in connection with the cargo of pineapple, and that an object of the inducement or encouragement was to force or require certain employers and persons to cease doing business with plaintiff and with certain other persons, and to force plaintiff to cease doing business with certain other persons.

The defendants, and each of them, deny these claims and particularly that there was a conspiracy of any kind, and also make the claims which I have set out above.

A conspiracy in restraint of trade or commerce between the Territory of Hawaii and any state,

whereby any person is injured in his business or property, and which was accomplished by inducing and encouraging the employes of an employer in concert in the course of their employment to refuse to handle or transport any goods or commodities, such as pineapple, or to perform any services in such connection, where an object of said inducement or encouragement was to force any person to cease dealing with an employer or any other person, would be actionable by the person suffering such damage in person or property against any defendant who did acts in furtherance of said conspiracy, knowing at the time of the illegal design.

If you find from the evidence that the individual defendants, among themselves or together with the defendants International and Local 8, or either of the unions, conspired together to restrain trade and commerce between the Territory of Hawaii and any state of the United States, and to encourage or induce the employes of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon a cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person, and with the purpose of doing injury to the business or property of the plaintiff, and that said damage to business or property was actually accomplished, then plaintiff is entitled to recover against any individuals who, knowing of the unlawful intent, did any act in fur-

therance thereof and reasonably calculated to effect the object of the conspiracy.

A conspiracy is an agreement between two or more persons for the purpose of doing an unlawful act by lawful means or doing a lawful act by unlawful means. Once formed, a conspiracy may be joined by any person who, knowing of the common design, aids or assists in the consummation thereof or does an act in furtherance thereof, reasonably calculated to accomplish the end. From the time of the formation of the conspiracy or the participation therein by anyone who knows of the common design, each of the persons found to be members thereof is responsible for any of the acts done by any party or person in pursuance of the conspiracy and to effect the common design, and is bound by all utterances and declarations of any other conspirator in furtherance of the common design.

A conspiracy may be proved by direct evidence or by the proof of such circumstances as naturally would tend to establish it and which are sufficient in themselves to satisfy an ordinarily prudent person of the existence thereof. It is not necessary that such an understanding be shown to be in writing. It is sufficient if the evidence shows a concert of action between two or more persons to accomplish an unlawful purpose.

It is possible for one of the defendant unions, through its officers or agents, or through another union, acting within the scope of their employment, to commit the acts outlined above with the object

and purpose therein stated or to act jointly or in pursuance of a common purpose or design. If the agents of either union, duly authorized and acting within the scope of their authority, participated in the formation of a conspiracy and did the unlawful acts charged, then you may consider whether the particular union was a member of the conspiracy.

If you find there was no conspiracy involving any individual defendants, then your deliberations will be confined to the defendant unions alone in accordance with the previous instructions. If as to any individual defendant you find he was not a member of such conspiracy or did no act in furtherance of any conspiracy, knowing of the common design and with the purpose of aiding and abetting the common object, then you should find in favor of that defendant.

An individual defendant may be a participant in a combination or conspiracy if, knowing thereof and of the objects and purposes thereof, he personally does an act in furtherance of the conspiracy and reasonably calculated to carry on the purposes and objects thereof. No individual defendant can be held liable merely because he may have been a member or officer of one of the defendant unions, even though you find the particular union is a participant in the conspiracy. No individual defendant should be held liable because of acts of other individual defendants in which he did not participate, aid or counsel and which he did not authorize or ratify with full knowledge thereof.

In any of these cases if you conclude that any individual defendant has not participated in any of the acts charged to the extent that I have indicated as necessary to make a defendant liable, you should return a verdict in favor of such defendant.

If you find that the International, acting through its agents or officers, in the course of their employment, or through Local 8 and Local 8 itself, through its officers and agents or members, in the course of their employment, induced or encouraged employes of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities, or otherwise handle, work on or perform services in connection with any goods, if one of the objects of the inducement and encouragement was to force or require any person to cease doing business with any other person, and as a direct result plaintiff was injured in business or property, then you may find liability against both the union defendants.

If you find only one is so liable, then you will find liability against such defendant.

If you do not so find, you will return a verdict for all defendants and against the plaintiff.

But if you find one of the defendant unions liable, or both of the defendant unions liable, and if on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will

add to the verdict the names of all the individual defendants against whom you find.

I will have to consider the form of verdict later. This is the substance of it.

If you find a verdict against any defendant you will then assess the damages. Plaintiff is entitled to recover against the defendant or defendants whom you find liable. But in this case the amount of damages is always the same. In other words, the plaintiff is not entitled to recover any more against a group of defendants than it is against one defendant, because the amount of damage or injury to property, if you find that was the direct and proximate result of anything that was done in this case, remains the same. Of course, you will have to assess that.

Now, the mere fact that I go on now to give you the rule of damages does not mean that I am instructing you to find liability. That is a question for you, but I have to cover the whole case and instruct you on all of it. So I shall now give you the rule of damages, if you should find anybody liable and find that there are any damages due.

In the case of Hawaiian Pineapple Company you cannot give a recovery for any loss of profit. You are not to apportion damages among the defendants if you find several liable, but you are to return damages in a lump sum against any or all of the defendants whom you determine to be liable.

In the case of the plaintiff Hawaiian Pineapple Company, against the International, you should con-

sider, in determining the amount of recovery, all damages to its business and property directly and proximately resulting from the unlawful action of the defendants. You should take into consideration such items, if you find there was such damage, so resulting, as the cost of repairs to the trucks, crane and barge; you should consider the value of the pineapple destroyed, if you find any was destroyed; you may consider the cost of the extra equipment and labor necessarily expended and shrinkage suffered by the Pineapple Company. However, the defendant or defendants are only liable for the reasonable and necessary expenses resulting from damage or injury to property, and are not liable for excessive or improper expenditures.

In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages.

In the case of Hawaiian Pineapple Company vs. The International Longshoremen's & Warehousemen's Union you are not authorized to award any damages for the purpose of punishing any defendant or defendants or of setting an example. I mention that because the rule is a little different in the cases

regarding the individuals, and I will take that up when we get to it.

As far as the Curto and Rosales cases are concerned, the Court will cover these together, since the principles of law are the same.

You will remember that the plaintiffs claim in these cases, and each of them, that there was a combination or conspiracy for the purpose of doing illegal acts, that as a result thereof there was a riot, and that during the course of the riot a large number of the defendants attacked the plaintiff, struck him, beat him, and kicked him, and as a direct and proximate result he claims to have sustained damages.

The defendants deny that there was any conspiracy which had for its purpose the injury of the plaintiff or the commission of any other unlawful act, and claim that plaintiff did not incur any medical or hospital expenses, and that they did not act in conspiracy or concert in rioting or other unlawful occurrence at the time and place claimed, and particularly they contend that there was no drinking or that there was any arming with deadly weapons. They contend that they did not either individually, concertedly, or as a result of any unlawful agreement or conspiracy of any kind, commit any acts of violence upon the person of the plaintiff.

These are the contentions in both cases. They also contend that any injuries sustained by plaintiff were not the result or caused by any wilful or wanton or deliberate acts of the defendants, or any of them. Likewise, they contend that the particular plaintiff

participated and proximately caused any injuries by carelessly, negligently and wantonly operating his truck in such a way as to almost run down certain people standing near a picket line at the Port of The Dalles at the time in question.

The striking or beating of a person without his consent is unlawful unless justified, and if any person is assaulted, struck or beaten without his consent he has a cause or claim against the defendants liable. If you find that either plaintiff Curto or Rosales were struck or hit by any of the defendants, I charge you that such act is unlawful, since no evidence of justification or consent was offered in this case.

Plaintiff in the particular case, if you find he was beaten or struck by any defendants by a preponderance of the evidence, is entitled to recover against any defendant whom you find from a preponderance of the evidence struck, kicked, hit or touched him without his consent.

Plaintiff is entitled to recover against any defendant whom you find by a preponderance of the evidence, being present, counseled, assisted, aided or abetted any defendants whom you find did strike the plaintiff.

If you find by a preponderance of the evidence in either of the individual cases of Curto or Rosales that the defendants so named, acting in concert, were engaged in an illegal act or a series of acts, and were acting in concert as a result of a preconceived design, even though the action was taken on the spur of the moment, and as a result thereof and in

the course thereof a particular plaintiff was injured or struck by one or more of the defendants, acting in accordance with the common design to accomplish an illegal act, then each of the defendants whom you find so acting would be individually responsible for any injury to the particular plaintiff, whether he struck the blow or not.

If the defendants were so acting together, and were in the commission of an unlawful act, and in the course thereof a particular plaintiff was injured, all the defendants whom you find by a preponderance of the evidence were acting in concert and doing the acts in accordance with a common design, with the purpose of carrying that out, would be liable for the injury and damage to the particular plaintiff.

If you arrive at this point—and again I say to you that I express no opinion on the merits of the case by giving you the rule of damages—then you must prepare to calculate the damage suffered by the particular plaintiff as a natural and probable consequence of any unlawful act done by the particular defendant in striking the particular plaintiff, as you have been heretofore instructed.

If you find that either of the plaintiffs in the personal injury cases is entitled to recover, then you shall award to him as damages such amount as will fully, fairly and completely compensate him for any injury he may have received, and for physical pain and suffering, if you find he sustained any, and for compensation for such time as he has lost from his work or employment, if any, together with any

expenses occasioned by the injury or by absence from work in so far as these items are shown by a preponderance of the evidence to have been the direct and proximate result of the wrongful act of the defendants or any of them. This computation will be made fairly, and without passion or prejudice.

In either of the individual cases if you find any one or more of the defendants is liable for compensatory damages, then you will leave his name in the verdict which I will give you. Then you will consider the question of punitive damages. You will not award any punitive damages unless you find that the particular defendant or defendants against whom you have awarded compensatory damages acted with malice and with oppression and under circumstances of aggravation.

If the assaults in the individual cases were only the consequence of sudden heat and not the result of a design for the injury of the plaintiff deliberately formed by the particular defendant or defendants against whom you have awarded compensatory damages, then you should give that circumstance great weight in determining whether to award punitive damages under the rules I have heretofore given you.

Punitive damages are never a matter of right, and are only allowed, if at all, when a preponderance of the evidence proves that the defendant under consideration has been guilty of oppression or malice.

Now, these amounts of damages are to be awarded fairly. Punitive damages are awarded under very

special circumstances alone, where you find that there were circumstances of malice or oppression and that the defendants against whom compensatory damages are awarded were acting with hearts bent upon evil. They are awarded for the purpose of punishment for malicious and oppressive acts and not on any other basis.

Again, because I give you the rule of punitive damages does not indicate any desire on my part to suggest to you that you should award punitive damages or compensatory damages, as far as that is concerned, because these are questions of fact which are solely for you.

You are the sole and exclusive judges of the facts in this case and the credibility of all witnesses. Your power of judging the effect of value of evidence, however, is not arbitrary but must always be exercised with legal discretion and in subordination to the rules of evidence.

The direct evidence of one witness to whom you give full credit and belief is sufficient to establish any issue in this case.

You are not bound to find a verdict in conformity with the declarations of any number of witnesses which do not produce a conviction in your minds as against the testimony of a less number or against other evidence or inferences from evidence which does satisfy your minds.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by

the manner in which he testifies, by the character of his testimony, by the interest he may have in the outcome of the case, or by evidence affecting his character or motives, or by contradictory evidence.

If you find that a witness has testified falsely in any one material part of his testimony, you may look with distrust upon the other evidence given by such witness; and if you find that any witness has testified wilfully falsely you will be at liberty to entirely disregard all the evidence given by such witness unless corroborated by other evidence which you do believe.

Any fact in this case may be proven by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly, without any inference or presumption, and which in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence.

Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another, and which, though true, does not in itself conclusively establish the fact but affords an inference or presumption of its existence.

You should look with caution upon the oral admissions of a party, as that kind of evidence is subject to mistake. The party himself may have been misinformed, he may not have clearly expressed his meaning, or the witness may have misunderstood him.

Now, Ladies and Gentlemen, before I finally submit this case to you there are some questions of law which I am going to discuss with regard to the case, so at this time I will excuse you. When you come back in I will give you instructions as to the forms of verdict and the way in which you will handle them. I will then submit the case to you. You may take a short recess.

(Thereupon the jury retired from the courtroom and the following occurred out of the presence and hearing of the jury.)

The Court: You may take your exceptions.

The Court. Now, Ladies and Gentlemen, the Court is about to submit these cases to you for decision on the facts. You will have with you in the jury room all of the documents which have been introduced in evidence. You will also have with you two forms of verdict in each separate case; that is, six forms of verdict.

Now, in the case of Hawaiian Pineapple Company v. the International Longshoremen & Warehousemen's Union, No. 5183, omitting the formal portions, the first part of this verdict reads as follows, if you should find for the plaintiff and against any defendant:

> "We, the jury, duly empaneled and sworn, return our verdict in favor of the plaintiff and against the defendants hereinafter named, and assess the plaintiff's damages in the sum of blank dollars."

Now, in that line, if you find a verdict for the plaintiff and against any defendant, you would fill in the amount of damages which you think the plaintiff would be entitled to under the evidence and under the instructions.

Now then, the verdict says: "This verdict is returned against the following named defendants." Then there is an instruction: "Strike out the names of any defendants listed below against whom you do not intend to return a verdict."

As I told you, you will consider the first part of the instructions, and if you find either or both of the unions liable thereunder then you will leave those two names, or one of them, according to your finding, in the verdict. If you do not find either of the unions liable upon the first part of the instructions relating to specific acts and intent, then you will use the other form of verdict:

> "We, the jury, duly empaneled and sworn, return our verdict in favor of the defendants and against the plaintiff."

If you find one or both of the unions liable under the first part of the instructions, then you will consider whether any individual is liable, also. And the names of the individuals are placed on the verdict. You will hold an individual defendant liable only if you find there was a conspiracy as charged in the complaint by the plaintiff and in the instructions.

Now, if you find liability on the conspiracy theory you will remember the instructions with regard to

that, and then you will strike out any individual defendants against whom you feel you should not return a verdict. And, finally, I assume, you would assess the damages.

Whichever form of these verdicts you use in this case will be signed by your foreman alone. This case is tried in the United States District Court, and therefore any verdict you return, whatever it is, must be unanimous. Any verdict must be unanimous. Therefore, before you report any verdict to the Court in any one of these three cases, check up to see with regard to that verdict that you are in unanimous agreement as to every feature, the liability of defendants, the amounts, and all other features connected with it, because you all have to agree to every verdict which you bring in or you cannot return it.

Now, turning to the Curto case, there the form of verdict for plaintiff reads as follows:

> "We, the jury, duly empaneled and sworn, answer the question submitted to us by the Court as follows:
>
> " 'Does the hereinafter named defendants' liability to plaintiff arise from willful and malicious injuries to plaintiff's person?' "
>
> You would answer that "Yes" or "No." You must be unanimous in that answer.
>
> Then it says: "We further return our verdict in favor of plaintiff and against the defendants hereinafter named, and assess the plaintiff's damages in the sum of blank dollars compensatory damages."

Now, if you answer the first question "No," and say that it does not arise from willful or malicious injuries, then you will only award compensatory damages. If you answer that first question "Yes," then you may go further and award punitive damages.

Then this says: "This verdict is returned against the following defendants," and then: "Instructions: Strike out the names of any defendants listed below against whom you do not intend to return a verdict." The names are listed, and of course you will treat that the same way.

If you find that plaintiff is not entitled to recover, then you will use this verdict:

> "We, the jury, duly empaneled and sworn, return our verdict in favor of defendants and against the plantiff."

Now, all features of any verdict that you return in these cases must be unanimous. Whatever verdict you return will be signed by the foreman alone.

In the case of Rosales, Civil 5105, we have the same situation. There the text of the verdict for plaintiff reads as follows:

> "We, the jury, duly empaneled and sworn, answer the question submitted to us by the Court as follows: Question: Does the hereinafter named defendants' liability to plaintiff arise from willful and malicious injuries to plaintiff's person?"

Then there is a blank line for the answer, and that question you will answer "Yes" or "No." If the

answer is "No," you will go on and answer the next question:

> "We further return our verdict in favor of the plaintiff and against the defendants hereinafter named, and assess plaintiff's damages in the sum of blank dollars."

In that you will fill in any amount of compensatory damages which you find. If you answer it "Yes," then you will not only award compensatory damages in the sum that you fill in but also you may award punitive damages, if you feel that that is proper.

There is one rule that you must remember. You cannot award any punitive damages unless you award compensatory damages. In other words, you cannot punish someone just out of thin air. You have to find first that the plaintiff has been injured, that the defendants are responsible, and there is so much damage by way of compensation before you can award any punitive damages whatsoever.

With regard to punitive damages, I again suggest that you use discretion.

Now in the event that you find the plaintiff Rosales is not entitled to recover, you will use this form of verdict:

> "We, the jury, duly empaneled and sworn, return our verdict in favor of the defendants and against the plaintiff."

Again, on the plaintiff's verdict, the names of the defendants are listed, and you will strike out those

against whom you do not find, if you determine to find a verdict for the plaintiff.

Now, Ladies and Gentlemen, that concludes this case as far as the Court is concerned. As I said before, I submit it with the utmost confidence that you will fairly and properly settle the issue of fact which are now comitted to you.

Swear the Bailiffs.

(Bailiffs were thereupon sworn and the jury retired to consider of its verdict.)

United States Court of Appeals
for the Ninth Circuit

International Longshoremen's & Warehousemen's Union (CIO), and International Longshoremen's & Warehousemen's Union, Local 8, Appellants, vs. Hawaiian Pineapple Company, Ltd., a corporation, Appellee.	No. 13,673 Oct. 25, 1955
Hawaiian Pineapple Company, Ltd., a corporation, Appellant, vs. Martin E. Aden, et al., Appellees.	

On Appeal from the United States District Court
for the District of Oregon.

Before: Healy, Bone and Chambers, Circuit Judges.
Chambers, Circuit Judge:

The issues here arise out of an industrial conflict. The principal situs of the events under suit was at the Columbia River port of the City of The Dalles, Oregon.

Below, the plaintiff was Hawaiian Pineapple Company, Ltd., (hereafter "Pineapple"), a corporation organized under the laws of the Territory of Hawaii.

Principal defendants were the International Longshoremen's & Warehousemen's Union (hereafter "International"), Local 8 of the International Longshoremen's & Warehousemen's Union (the Portland, Oregon, local, hereafter "Local"), and various individual longshoremen, members of Local or officers or agents of International.

The events in suit happened mainly between September 24, 1949, and October 27, 1949.

Trial was by jury. A verdict was rendered in favor of Pineapple against International and Local for $201,274.27. The jury about-faced and rendered a verdict in favor of the individual defendants and against Pineapple.

Background information should be reported. In the summer of 1949 International's local unions in the Territory of Hawaii were engaged in strikes and picketing against others than Pineapple. Transportation to and from the islands had dwindled to a trickle. Pineapple had pineapple in Hawaii and it had California fresh fruits about ready for the cannery of a subsidiary at San Jose, California. At the California cannery each year canned Hawaiian pineapple would be uncanned, then would be combined with mainland fruits and recanned to produce canned fruit salad. It is to be noted that the process involved canning fruits other than pineapple only once.

Common carriers, tied up in the Islands, were unavailable to move Pineapple's pineapple to California. Therefore, Pineapple decided to move as its own self-carrier some of its cases of pineapple packed

in No. 10 cans. Through its wholly owned subsidiary, Isleways, Ltd., it chartered an ocean-going barge, arranged for an ocean-going tug to tow the barge to the mouth of the Columbia River and a river tugboat to take the barge to The Dalles, the river port selected as the water destination.[1] The Dalles is a small port and not noted for coastal traffic. Prior to September, 1949, it seems to have escaped any serious attention from International or Local. The port obviously was selected by Pineapple because of the absence there of International and its locals.

Pineapple arranged for the services of a boom crane of the Goodat Company. This company was willing to sell its service to unload Pineapple's pineapple, but after a day or two, of Pineapple's unloading troubles, Goodat had all of Pineapple's problems it wanted and sold the crane to Pineapple on a "do-it-yourself" basis.

Pineapple planned to transport the pineapple from The Dalles to San Jose by the trucks of various trucking companies and also by rail freight out over the Union Pacific, which serve The Dalles.

Below is a list of some of the troubles that developed for Pineapple in trying to unload the barge at The Dalles:

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[1]The original destination of the barge was Tacoma, Washington, where longshore work was dominated by an American Federation of Labor union. En route, it became apparent that the barge would have about as much trouble unloading at Tacoma as Pineapple thought it would have at I.L.W.U. seacoast ports, which were reported to be refusing at the time Hawaiian cargo.

1. Before the arrival of the barge at The Dalles on September 24, 1949, Matt Meehan, a representative of International in the area, tried to dissuade the officials of the Port of The Dalles from letting Pineapple use the port and facilities.

2. On September 25, members of Local from Portland came to The Dalles in private cars and formed a picket line outside the dock of the Port of The Dalles. This line was maintained for some days.

3. Longshoremen met California teamsters in their trucks at a distance of several miles from The Dalles and tried to dissuade them from coming to The Dalles to pick up cargo. Four trucks, however, on September 28, 1949, came on through to the docks. Extra local police were on duty, but the longshoremen reacted violently to the arrival of the trucks. They broke through the police guard, ran to the dock. In the ensuing riot, the truck drivers were threatened and two were beaten. (The trucks went back to California empty.) The Goodat crane was attacked, but no serious damage was done to it. Unsuccessfully the mob tried to cut the barge loose. Over 400 cases of pineapple were tossed into the Columbia River.[2]

4. After the riot the picket line dispersed, at least for a time, but bevies of longshoremen from Portland continued for several days to walk the streets of the little town.

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[2]Subsequently, in an Oregon state court criminal proceeding, a number of longshoremen pleaded guilty to an indictment for riot at the Port of The Dalles. The indictment emphasized the physical assault upon the truck drivers.

5. The tug languished at the dock until October 19, when Pineapple started to move the cargo via Union Pacific. Freight cars were moved on to the dock, a picket line immediately formed again. Another stalemate followed. Eventually, the cargo did move to San Jose beginning on October 26. At the time the strife ceased, an announcement was made that the Port of The Dalles had made some sort of concession to the longshoremen, but no contract was entered into between the port and Local, if such the port could. The concession was principally higher wages for the longshoremen who, we take it, remained non-union.

Earnestly, Pineapple appeals from the judgment which permitted the individuals to escape liability and International and Local cross-appeal, seeking relief here from the judgment against them. For reasons hereafter stated, the judgment rendered below will be affirmed as to all parties before this court.

Section 303 of the 1947 Labor-Management Relations Act is found as 29 U.S.C.A. §187. So far as pertinent, it reads as follows:

> "§ 187. Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages.
>
> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, trans-

port, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is——

"(1) forcing or requiring any employer to self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount

in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The charges against International and Local are laid primarily under the foregoing section, although the trial court thought as to these two a case was also stated against them under the common law.

It should be pointed out that in this case a pretrial order was formulated.[3] First, it listed the admitted facts, then set forth the contentions of the respective parties, and then listed the issues. Then it concluded with a statement that the order superseded the pleadings. Further, it provided that the order should not be amended except to prevent manifest injustice. Both parties approved the order and no effort was ever made to amend it. Such a type of pretrial order does tend to channelize contentions and does remove some of the flexibility lawyers ordinarily have under the Federal Rules of Civil Procedure. It is not intended here to comment on the advisability of the practice, but rather to point up the feature which will appear important, particularly with reference to the appeals of the individual defendants.

Of the events surrounding the unloading of the barge, it seems fair to say Pineapple contended all were a part of an attempt to isolate the whole Territory of Hawaii. Aside from the "we didn't do it"

[3]The contentions and issues of the pretrial order are set forth as Appendix "A" to this opinion.

defenses which defendants usually and naturally present, Local (or local members particularly) claimed to be concerned with wages and working conditions at the Port of The Dalles, a municipal entity. No suggestion is made that International or Local was bargaining agent for anyone employed by the Port of The Dalles. Some contention was made that Pineapple was the alter ego of companies in Hawaii against whom units of International were on strike. This latter contention does not seem to have been proved to the point of any jury question.

Without fixing any responsibility for the moment, the resistance to the unloading at The Dalles seems to have followed a pattern of complete resistance to "hot cargo" and the resistance reached lawlessness and brutality.

The issues properly went to the jury on the basis that International, Local and the individuals had no relation of employer and employee with Pineapple and that there was no legal excuse for any defendant to attempt to boycott a cargo of Pineapple, if such they did.

The appeal of International and Local

Of course, the Local and International abstractly could do nothing. Things, if done by them, had to be done by officers, agents or members then authorized or subsequently ratified. The court instructed that certain persons were agents.[4] It did not give long

[4]The instructions given by the trial judge are appended to his decision on the motion for a new trial reported as Curto v. Inter-

instructions requested by the unions on "authority." It would appear that the unions were fairly protected when the court said to the jury:

> "The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan were agents and representatives of Defendant Local 8. It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment."[8]

If a party receives the substance that he is entitled to in an instruction, he cannot complain that the court did not use his words. This instruction and the others were adequate.

By section 301 of Taft-Hartley (see 29 U.S.C.A. 185) an employer or a union is "bound by the acts of its agents" and "the question of whether the spe-

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national Longshoremen's Union, 107 F. Supp. 805 at 817. In view of the prior publication of the complete instructions, this court's opinion will be shorter than it otherwise would be were it not for such publication. This opinion is written on the assumption that he who reads it will have first read Curto in its entirety. (The individual judgments in favor of Curto and Rosales were not appealed. The parties inform the court that those claims have been settled.)

[8]Further agency instructions are contained in the complete instructions. See footnote No. 4.

cific acts were actually authorized or subsequently ratified shall not be controlling." Surprisingly, there is little case law yet on the agency feature of the section. Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act and the decision of United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395. We think the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act, then the union is responsible.

The unions could not have been held in this case without a finding by the jury that some one or more persons in authority were responsible for what transpired, either the union officers named as individual defendants or some officials or agents not parties. It could not be sustained against the unions on the bare conduct of the rank and file.

The instructions covered the factor of "scope of employment" in a manner which certainly under the Labor-Management Relations Act was as favorable as Local and International could ask.

Again, it is specified as error that the jury was not adequately instructed on minimization of damages. The court instructed:

> "In this case, if you do award damages, you must remember that it is the duty of plaintiff

to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages."

The instruction was adequate. It is to be remembered that jury instructions can grow so long and so interminable that the sheer weight of them can make them plain useless. If a point is adequately covered, and it was, succinctness is to be commended and not criticized.

International and Local also assert the judgment must be reversed as to damage because the evidence conclusively shows Pineapple did not mitigate its damage at San Jose, California, at the canning plant of Pineapple.[8] The arguments go to matters of business judgment. The arguments advanced are quite convincing but fall short of satisfying us that we should hold as a matter of law that Pineapple did not use sound judgment or attempted to pile up its damage. One thing, for example, its course of conduct, the jury may have thought, may have been dictated by an attempt to hold its trade built up

[8]The verdict of $201,274.27 was somewhat less than the prayer of Pineapple's complaint, but it was for the total amount that plaintiff argued to the jury it was entitled to receive. Principal items were physical damage at the dock of The Dalles, consequential damage at The Dallas (such as cost of watchmen and extra rent of facilities) and consequential damage at Pineapple's Barron-Gray division at San Jose, California, where the cost of the company's product was increased.

through the years. Also, Pineapple may have reasonably thought from day to day its trouble with the defendants would be over tomorrow. That may have influenced Pineapple's course of action. Minimization here was strictly a jury question. Either conclusion on minimization which the jury might have adopted should be sustained.

Defendants proffered an instruction which said, in effect, that the Taft-Hartley law was not violated if the longshoremen talked to truck drivers employed by Pineapple and told them the cargo was "hot" or told them that working conditions and wages were threatened at the Port of The Dalles. Part of International's and Local's contentions must be postulated on carrying Section 8(e) over to qualify Section 303. That would appear to be concluded by Printing Specialties v. LeBaron, 9 Cir., 171 P.2d 331. If otherwise applicable, facts in the case would not seem to admit of the introduction of the elements of 8(e) herein. There is no merit in the specification.

The defendants International and Local press the point that there is a logical inconsistency in the jury's finding them liable and exonerating the individual defendants from any liability. As a practical matter it does seem a little difficult to understand why the jury found International and Local liable and did not also hold some of the leaders responsible. However, if there be an inconsistency in the verdicts which might have justified a trial court in granting a new trial, it may nonetheless stand on appeal even though inconsistent. That is the jury's prerogative.

However, we think there was a difference in the theories upon which the possible liabilities of the defendants were projected. In considering this point we must keep in mind that the trial court held the plaintiff to an all-or-nothing recovery against the individuals and required as a condition of their liability that a union first be found liable. Below, the unions wanted verdicts prepared which would have permitted the finding of varying amounts against varying individual defendants. The court rejected the postulate and of the rejection no defendant has complained here, although complaint is made by Pineapple that the jury was not permitted to consider the liability of all individuals for a common sum different from the sum of liability found as against International and Local. Conspiracy is not any necessary element of Section 303 liability of International.

No one knows what the jury thought, but it may have thought:

1. Only individual International and Local officers not parties defendant had the object from beginning to end of causing others through pressure on others' employees to cease dealing with Pineapple—that the leaders named herein as defendants had a legitimate object.

2. Some damage, slight or great, may have occurred from the unions' activities before the minimum of two individuals formed any conspiracy. In such an event the strait-jacket as to damages—the same amount against the individuals as against In-

ternational or Local—would have justified the jury in returning a verdict in favor of the individuals.

3. The central figure, agent Meehan, perhaps, was the man who triggered the whole performance. It may have found the basis to fix the liability on Local and International solely in one man, for example, Meehan, or some other man. It may not have thought one man, even though he acts for another so as to bind another, can be guilty of a concert of action, that is, that he couldn't conspire or act in concert with himself.

Of course, upon a straight case of trespass or trover some defendants who participated in the destruction of pineapple on the docks would have been absolutely liable for that damage, but still under the no-liability theory for less than all acquiesced in by plaintiff, it affords no basis to attack the verdict because we know that certain individuals were necessarily liable for a fraction of the total damage. Indeed, International and Local do not urge that the inconsistency lies in exonerating the rank and file who held no office or position. They really urge that it is in exonerating the leaders; at least that is the effect of their arguments.

It well may be in the inviolate sanctum of the jury room, the jury in considering the liability of International and Local, which it was bound to do first thing, did find the liability through the activities of two, three, four or five agents or officials actually named as defendants individually and their conduct had the element of conspiracy in it. It may

be that, having fixed that liability, it passed on to consider the liability of individuals, that it may have its eyes then solely on the rank and file and thought that to impose total liability as to them was impossible. It may have overlooked a few officials and agents who should have been held liable, in view of its first determination on International and Local. But we cannot presume that the jury didn't do its duty. The presumption is that it did its duty. And especially is this true where there were combinations of permissible findings that were not inconsistent. But if plain inconsistent, that was the jury's prerogative here. See Dunn v. United States, 284 U.S. 390, 80 A.L.R. 161; Jayne v. Mason & Dixon Lines, 2 Cir., 124 F.2d 317. If the master and servant cases cited by International and Local were applicable, the short answer would be: Possible combinations of facts existed which would make the verdicts consistent within themselves. Also, we are sure an additional quantum of proof was required as to the officials of International and Local who were actually named as defendants than as against the unions.

So far as International and Local are concerned, the trial court's instructions were, in our opinion, irreproachable. They gave International and Local everything to which they were entitled. In cases of doubt, the doubts were generally resolved in their favor, e.g., those on the law of agency. The instructions incorporated the ordinary rules of appointment, ratification, authorization and ratification without any real discount because of Section 301, 29 U.S.C.A. 185.

The instructions are cohesive, succinct and seem eminently fair. Also, they have avoided well the pitfalls that one may expect in a new field.

Specifications of errors not mentioned above but made by International and Local we have examined and found without merit.

The liability of the individuals.

On the controversy of Pineapple versus the individual defendants we find the contentions of the parties and issues set forth in the pretrial order, the trial court's instructions, the objections to the instructions and to the form of verdict all very, very confusing. This is not due to shortcomings of the trial judge who presided or to lack of skill of the capable lawyers on both sides who tried the case. As of the time the case was in the district court, United Construction Workers v. Laburnum Construction, 347 U.S. 656, and other cases had not been decided.

The jury was instructed that it could not find any individual defendant liable if it did not first find International and Local liable. We think it may be said that that was probably a mistake. There was obviously diversity of citienship here and over $3,000 in controversy. However, the jury did find that International and Local were liable and that in our view removes most of the objections to the trial court's requirements that the liability of International or Local was a prerequisite to the liability of the individuals. We think that had the jury not

found International or Local liable the instructions would require a reversal. But, distilling the case down, we think that Pineapple did in the end project its case for liability on the basis of a common sum against all, that is, as against all defendants found responsible.

We are not unmindful of the fact that uncontroverted and incontrovertible evidence was offered showing certain members of Local damaging property of Pineapple. But in that alone there was a possibility of liability of many for varying amounts, and a possibility of joint liability of many individuals for all or part of the property damage, but still far short of the total damage for which the unions were found responsible.

As we see it, the gravamen of Pineapple's complaint as submitted to the jury on the individuals was that they violated Section 303 of the Labor-Management Relations Act. That is not to say that the act created any new liability as against individuals. Rather it is a belief that individuals whose conducts meets the tests of Section 303 undoubtedly offend the common law of the state of Oregon. For that, we think it is a corollary of Laburnum that individuals may be brought to heel in a diversity case with the required $3,000 in controversy, and we think the Labor-Management act did not abolish by implication the common law tort liability of individuals. The individual defendants seem to concede in the supplemental brief filed by them that a case against them was entitled to go to the jury under the law

of Oregon, but they stand on the ground that concert of action, if it existed, was not found by the jury to be coextensive with that of International and Local. In view of the defendants' concession, futility will not be advanced by us by seeking to prove what defendants admit. Before Laburnum there was good argument that Section 303 of the Labor-Management Relations Act did abolish individuals' liability.

Practically, the instructions defined conspiracy as "a concert of action." We do not think Pineapple's contentions were framed to permit a verdict against one individual alone. We think, the unions being held responsible, there was little room to find any of the individuals liable other than in concert with the union, albeit that if the unions had not been found liable, two or more individuals might have been found liable under the evidence, not under the instructions. Stated another way, assuming one or more agents of the International and Local were acting within scope of their authority or apparent authority, there could be little doubt of the liability of International and Local for the full amount of the damage. We agree with counsel for individuals that when counsel for Pineapple said, in discussing the form of the verdict, the following:

> "Personally, we would prefer to have it submitted to the jury on just one theory, but it seemed to us that there was a possibility that the jury might want to do that, and I think they could on the evidence. However, in our view of the case this was a conspiracy and every part was a part of that conspiracy. Under the

> law, as we understand it, a conspirator coming into the picture a few days later than another is not relieved of the damages that have accrued at the time he entered the conspiracy,"

at that point the trial court was entitled to put Pineapple on an all-or-nothing basis for the same amount as to each defendant found liable. Therefore, we cannot see that Pineapple's objections to the instructions were well taken in the light of eventualities—although (repeating again) we think that had International and Local been found not liable, the objections would have been good.[7]

Counsel for defendants remind us that evidence of violence is no substitute for the proper answer to legal questions. Nevertheless, we find it appropriate to comment on the whole case. Here we had an exceptionally well documented story of terrible lawlessness for which the peers (Oregon neighbors of the individual defendants) in the jury box found International and Local, and we think rightly so, responsible. There is evidence of damage on the dock of the Port of The Dalles for which certain individuals were liable in the very least for property damage, and the viciousness of it all as one sees what happened in motion pictures of the events points to exemplary damages as against certain individuals. But in its judgment, which is not our province, Pineapple did not focus on the damage at the dock, but let the case go on an all-or-nothing basis. That being

[7]The objections taken by Pineapple are listed herein as Appendix "B".

true, it cannot complain that the jury failed to hold the rank and file responsible.

The injustice of the case is that one or more leaders, who were officers or agents of International and Local and who, we think, probably triggered the whole operation, escaped individual liability. As to their exoneration, there was probably an inconsistency in the verdict; but, as we have held, it is a case where the jury had a right to be inconsistent. But finally we cannot say there was inconsistency.

Affirmed.

APPENDIX "A"

Extracts from Pretrial Order

Plaintiff's Contentions

1. That the defendants International and Local 8 were citizens and residents of states or territories of the United States other than Hawaii at the commencement of this action and ever since and now are such citizens.

2. That at all times herein mentioned the duly authorized officers and agents of defendant International were and now are engaged in representing and acting for employee members of its affiliated Local 8 in the District of Oregon.

3. That at all times hereinafter mentioned Hawaiian Local was engaged in a labor dispute with certain employers in Honolulu, Territory of Hawaii, and the members of said Hawaiian Local were out on strike; that plaintiff and said Isleways, Ltd. were not members of said group of employers with which said Hawaiian Local was engaged in a labor dispute.

4. That at all times herein mentioned plaintiff was not involved or engaged in any labor dispute with its own employees, with the Hawaiian Local, or with the defendants; nor was Isleways, Ltd. engaged in any labor dispute with its own employees, with the Hawaiian Local, or with the defendants.

5. That prior to the acts of the defendants hereinafter complained of:

(a) Plaintiff had chartered a certain ocean-going barge and caused it to be loaded at Honolulu, Terri-

tory of Hawaii, by employees of Isleways, Ltd. with a cargo of approximately 115,000 cases of pineapple of a value of approximately $687,700.00 for shipment and delivery to processors of fresh fruits in California.

(b) Plaintiff caused said barge to be towed to the Pacific Coast by an ocean-going tug "Ono" owned and operated by Isleways, Ltd. and thence into the Columbia River where it was towed by a river towboat to the terminal of the port of The Dalles at The Dalles, Oregon, where said barge with its cargo arrived on September 24, 1949.

(c) Plaintiff had made an agreement with the port of The Dalles prior to the arrival of the barge and her cargo of pineapple at the port of The Dalles whereby the port of The Dalles undertook to discharge and unload the said cargo and to load the same upon railroad cars and trucks for a shipment to San Jose and to other points in California; in accordance therewith, the port of The Dalles assigned to a group of its own employees the work involved; and that at all times herein mentioned there was no order or certification of the National Labor Relations Board determining the bargaining representative for the employees of the port of The Dalles who were assigned to the above work.

(d) Plaintiff had similarly made arrangements with interstate truck and rail common carriers to handle said cargo of pineapple at the port of The Dalles and to transport the same to San Jose and other points in California and had entered into an agree-

ment with a crane company for the services of a derrick and an operator therefor at the port of The Dalles.

(e) All the above arrangements and agreements had been made so as to commence the unloading of said pineapple from said barge and the loading of the same upon railroad cars and trucks on September 26, 1949.

6. That the defendant International, acting through its officers and agents and Local 8, and the defendant Local 8, acting through its officers, agents and members, and the individual defendants combined and conspired between August 22, 1949, and October 30, 1949, to boycott plaintiff's cargo of pineapple, to injure and damage plaintiff's business and property, to prevent the plaintiff from unloading or causing to be unloaded its cargo of pineapple and from shipping or having the same shipped by interstate common carriers from the port of The Dalles, Oregon, to San Jose and other points in California, and to violate Sections 303(a)(1) and 303(a)(4) of the Labor Management Relations Act of 1947, and that pursuant to said combination and conspiracy and in furtherance thereof the defendants engaged in and induced and encouraged the employees of employers engaged in unloading said barge and employees of employers engaged in transporting freight by rail and by truck between the state of Oregon and California to engage in a concerted refusal in the course of their employment to refuse to transport, handle or work on or perform any services in connection with

plaintiff's cargo, with an object of forcing and requiring plaintiff and Isleways, Ltd., to cease doing business with said employers and with persons in the State of California to whom said cargo was being shipped, and other states, and of forcing and requiring said employers and persons to cease using, handling, transporting or otherwise dealing with plaintiff's pineapple and to cease doing business with plaintiff and with Isleways, Ltd.; and with the further object of forcing and requiring the port of The Dalles to assign the particular work of unloading said barge and of loading the cargo on railroad cars and trucks to members of defendant Local 8 rather than to its own employees; and the defendants committed the following acts.

(a) Defendants called upon the Commissioners of the port of The Dalles in order to persuade and force the said port to breach its aforesaid agreement with the plaintiff and to refuse to permit the docking or unloading of plaintiff's barge at the port terminal, and defendants called upon and communicated with interstate truck and rail common carriers and with the crane company to persuade and force said employees and persons not to handle or to haul plaintiff's cargo of pineapple.

(b) Defendants further called upon and communicated with officials and representatives of the labor organizations representing the employees of said interstate truck and rail common carriers and with the employees of said crane company to persuade and force said employees to engage in a concerted refusal

in the course of their employment to transport, handle, work on, or to perform any services on plaintiff's cargo of pineapple.

(c) Commencing September 26, 1949, the defendants placed and maintained pickets at the entrance to the terminal of the port of The Dalles.

(d) Defendants on September 28, 1949, at about the hour of 2:00 P.M., forcibly and violently overran and thrust aside the police officers of the City of The Dalles who were on duty at the entrance to the terminal of the port of The Dalles and staged a riot upon the docks and in the warehouses of the port of The Dalles in which more than 100 members of the defendant union Local 8 participated; said defendants, many of them carrying knives, cargo hooks, 2x4s, axes and crowbars and other dangerous and deadly weapons, beat and injured employees of the plaintiff and other persons and damaged and wrecked trucks and a derrick belonging to or leased by plaintiff and damaged and threw into the Columbia River approximately 409 cases of pineapple, each case consisting of six No. 10 cans, which pineapple was wholly lost to the plaintiff; said defendants further cut and destroyed the hawsers holding the said barge to the dock and set the barge adrift.

(e) Defendants on September 29, 1949, proceeded generally from the City of Portland, Oregon, to The Dalles and caused additional members of defendant Local and of other local unions affiliated with International, exceeding 400 in number, to proceed to The Dalles and to patrol the streets of the City of The

Dalles for the purpose of again and further dissuading and intimidating employees of employers present at the dock of the port of The Dalles from further attempting to discharge plaintiff's cargo and transport the same to California.

(f) Defendants on October 20, 1949, resumed their picketing of the entrances to the port of The Dalles.

(g) That the defendants discontinued their picketing of the port of The Dalles on October 27, 1949, but continued to induce and encourage plaintiff's employees and the employees of other employers present at the port of The Dalles to refuse to handle or perform any services in connection with plaintiff's cargo.

7. That as a result of the foregoing activities of the defendants in furtherance of their combination and conspiracy:

(a) The employees of the port of The Dalles of the interstate truck and rail common carriers and the crane company concertedly refused on September 26, 1949, and thereafter to handle, transport or perform any services in connection with plaintiff's cargo of pineapple, and plaintiff's employees likewise concertedly refused in the course of their employment to perform any services from September 28, 1949, until October 19, 1949, and from October 20, 1949, until October 27, 1949.

(b) Plaintiff was forced to discontinue any attempts to discharge or to have discharged its cargo and to transport the same to the State of California between September 26, 1949, and October 30, 1949,

and was forced and required to cease doing business with the various employees mentioned above and with various processors of fresh fruits in California who in turn were forced to cease doing business with plaintiff.

(c) The defendants succeeded in forcing the crane company to breach its agreement with the plaintiff and to cease doing business with it from September 26, 1949, on, and in causing the port of The Dalles to refuse to perform its agreement with the plaintiff and to refuse to allow the plaintiff to discharge a cargo of pineapple from September 28, 1949, until October 19, 1949, and from October 20, 1949, until October 27, 1949.

(d) The defendants succeeded in persuading the interstate truck and rail common carriers not to transport or handle plaintiff's cargo of pineapple and forced said operators to cease doing business with plaintiff from September 26, 1949, on.

8. That as a direct and proximate result of the aforesaid activities of the defendants and the consequences thereof, the plaintiff was injured in its business and property and sustained damages thereto, which were wilfully and deliberately inflicted, in the amount of $234,280.29, together with attorneys' fees in the amount of $25,000.00, in the following respects:

(a) Except for the above described activities of the defendants, plaintiff would have been able to commence the delivery of a portion of its cargo of pineapple to its Barron-Gray Packing Company Division

at San Jose, California, for use in the preparation of fruit cocktail, which plant had purchased large quantities of perishable fruits such as peaches, pears, cherries and grapes for use in the preparation and canning of fruit cocktail; but because of the failure to receive the delivery of the pineapple on September 27, 1949, said fresh fruits were in immediate danger of spoiling and said plant was therefore compelled to process and can all of said fresh fruits without the addition of the said pineapple, and upon the receipt of a portion of said cargo of pineapple on and after November 1, 1949, was compelled to re-process the aforesaid fresh fruits in order to add the pineapple in the preparation of fruit cocktail, all of the said processing and re-processing costing plaintiff an additional $147,611.99.

(b) Plaintiff was compelled to pay charter hire of the ocean-going tug "Ono" and of the said barge for a period of 40 days while they were idle, at a cost of $720.00 and $230.00 per day, respectively.

(c) Plaintiff was compelled to pay the salaries, wages and expenses of its officials and employees concerned with said cargo, the cost of repairs to the trucks, derricks, and other equipment damaged by the defendants, the truck hire, telephone, telegraph and long distance charges, fees and expenses of legal and public relations counsel and other miscellaneous expenses.

(d) Plaintiff lost 409 cases of pineapple valued at $5.9829 per case.

(e) Plaintiff was compelled to truck a large quantity of pineapple to Portland to be there loaded on railroad cars at an additional cost of $2298.56.

(f) Plaintiff was compelled to employ special police officers to protect its property from damage and its employees from injury at a cost of $1884.32.

(g) Plaintiff was forced to incur medical and hospital expenses in caring for its injured employees.

(h) Plaintiff has been compelled to employ attorneys in the preparation, institution, maintenance and prosecution of this action, and will incur expenses and fees for such services in the amount of 25,000.00.

Defendants' Contentions

(1) That the amended complaint and plaintiff's contentions do not state a claim upon which relief can be granted against any of the defendants, in that there is no federal common law tort of conspiring to boycott a business or to injure a business.

(2) That defendants International and Local 8 lack capacity to be sued as entities.

(3) The Court lacks jurisdiction over the person of the International, in that it is an unincorporated association with its headquarters and principal office located in the State of California, and service of process upon it is insufficient.

(4) That service of process upon defendant Local 8 is insufficient.

(5) That as a matter of law plaintiff is not entitled to seek or to recover attorneys' fees against defendants.

(6) Defendants deny all of plaintiff's contentions, except the facts heretofore admitted, and put plaintiff upon proof thereof.

(7) Defendants deny that any conspiracy of any kind was entered into between any of the defendants hereto.

(8) That said Hawaiian Pineapple Company and Isleways are wholly owned subsidaries and alter egos of Castle & Cook, Limited, Theo Davies, Alexander-Baldwin and Matson Navigation Company and, as such, any strike referred to in said cause of action was a primary strike and not violative of any section of the Taft-Hartley Act or of any general or common law of the United States.

(9) That any acts done and performed by said defendants were done and performed for the purpose of achieving legitimate ends of collective bargaining and the legitimate ends and purposes of trade unionism, namely, the prevention of breaking down the wages and working conditions of the membership of defendant Local 8.

(10) That diversity of citizenship is not shown or pleaded, defendants contending that said plaintiff has qualified as a corporation to do business in the State of California and maintains an office in the State of California; defendants alleging and contending that defendant International Longshoremen's &

Warehousemen's Union is a citizen and resident of the State of California; both said Hawaiian Pineapple Company and said defendant International Longshoremen's and Warehousemen's Union being residents and citizens of the State of California, having their principal offices in the City and County of San Francisco, State of California.

(11) That said defendant Mat leehan at no time was the agent or representative o he defendant "International" in and about the ma.ters as set forth in plaintiff's said contentions.

(12) That neither said defendant Local 8 nor any of the said individually named defendants were the officers, agents or representatives of said International in relation to any of the matters set forth in said plaintiff's contentions.

(13) That each and all of said defendants deny that they either singularly or collectively or in concert with each other did or performed any of the acts or things set forth in plaintiff's said contentions.

(14) That the amended complaint and plaintiff's contentions do not state a claim upon which relief can be granted against any of the defendants, in that the Port of The Dalles is not "an employer" or "other person" within the meaning of Section 301 of the Taft-Hartley Act.

(15) That in this same connection the Court lacks jurisdiction over the person of the International, in that none of its duly authorized officers or agents are

engaged in representing or acting for employee-members on behalf of the International within this district.

(16) That the amended complaint and plaintiff's contentions do not state a claim upon which relief can be granted against defendant Matt Meehan and all other individual defendants who have been heretofore served with process, in that Section 303 of the Taft-Hartley Act authorized actions for damages against labor organizations only and not against individuals.

(17) That the court lacks jurisdiction over the person of the International, in that none of its duly authorized officers or agents are engaged in representing or acting for employee-members on behalf of the International within this district.

(18) Defendants contend plaintiff could have purchased ample pineapple from other sources without money loss and thereby minimize damages.

(19) Defendants contend plaintiff could have refrained and refused to buy large quantities of fresh fruit in 1949 under its contracts to purchase fresh fruit from growers thereof without money loss and thereby minimize damages.

Issues

The issues which then follow in the pretrial order are as follows:

(1) Do plaintiff's contentions and the first, second and third count in the amended complaint state a claim against defendants upon which relief can be granted?

(2) Can the International and Local 8 be sued as entities under plaintiff's contention and under the amended complaint?

(3) Does the Court have jurisdiction over the subject-matter of plaintiff's contentions and over the persons of the defendants?

(4) Can attorneys' fees be awarded to plaintiff in this alleged cause of action?

(5) Was there any conspiracy to injure plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?

(6) Did the International engage in the acts and conduct alleged by plaintiff?

(7) Did Local 8 engage in the acts and conduct alleged by plaintiff?

(8) Did the individual defendants engage in the acts and conduct alleged by plaintiff?

(9) If so, did the alleged acts and conduct cause the consequences claimed by plaintiff?

(10) If so, were such acts and conduct the proximate cause of damages alleged to have been sustained by plaintiff?

(11) If so, what was the amount of the damages that plaintiff allegedly sustained?

(12) Was either Local 8 or any of the individual defendants named the authorized representatives or agent of the International?

(13) Was the Hawaiian Pineapple Company a subsidiary of Castle & Cook or any other member of the Big Five and, therefore, the strike as alleged, if any, a primary strike within the meaning of the Taft-Hartley law?

(14) Was the purpose and objects of Local 8 at The Dalles to protest the breaking down of working conditions and wages and, therefore, a legitimate purpose of collective bargaining and picketing within the meaning of the Taft-Hartley Act?

(15) Is the Port of The Dalles a "person" or "employer" within the meaning of the Taft-Hartley Act as heretofore set forth in defendants' contentions and in our motion to dismiss?

(16) Were all of the alleged acts allegedly done or performed by any of the defendants, either singularly or collectively, violative of any right or rights of the plaintiff?

(17) Were any of the remaining defendants acting as agent, officer or representative of the defendant International?

(18) Was there any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?

(19) Did the Hawaiian Pineapple Company, Barron-Gray Division, at San Jose, California, neglect and refuse to purchase large quantities of fresh fruit under its fresh fruit contracts in 1949, which it could

have done without money loss, and thereby minimize damages?

(20) Did the Hawaiian Pineapple Company fail to purchase pineapple from other sources and thereby fail to try and minimize damages?

(21) Does the court have jurisdiction of the subject-matter and of the defendants?

(22) (a) Did the defendants engage in a combination and conspiracy to boycott plaintiff's cargo and to injure its business, etc. and engage in various acts and conducts in furtherance thereof as alleged by plaintiff?

(b) Did the defendants engage in a combination and conspiracy to violate Section 303(a)(1) of the Labor Management Relations Act in the manner complained of by the plaintiff?

(23) If so, did the alleged combination and conspiracy and the acts and conduct in furtherance thereof cause injuries to plaintiff's business and property?

(24) If so, did such injuries cause plaintiff to suffer damages in the sum of $234,280.29, together with reasonable attorney's fees in the amount of $25,000.00?

(25) Were such injuries intentionally and wilfully inflicted?

APPENDIX "B"

Objections of Hawaiian Pineapple Company to Trial Court's Instructions (extracts from transcript of trial).

Mr. Krause (of counsel for the plaintiff):

* * * * *

"Then the Plaintiff Hawaiian Pineapple Company will take an exception to the instruction that there can be no verdict against the individuals in that case unless the unions are also found liable, because there is a cause of action stated against them that was broader than a conspiracy to restrain trade, and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in. That was one of the counts under the original complaint, and it seems to me that they could bring in a verdict in the Hawaiian Pineapple Company case even though they did not bring one against the unions.

"Then my second point is the failure to instruct in the Hawaiian Pineapple Company case that the plaintiff could recover against the individuals and/or unions on a theory other than the Taft-Hartley Act, because there was a diversity of citizenship and they engaged in physical activities that prevented us from carrying on our business which they were in no event, under any theory of labor dispute or anything else, entitled to engage in. We would be entitled to recover on that theory if there were no Taft-Hartley action involved here.

"Those are the only things that we feel the Court has not covered."

(Endorsed:) Opinion. Filed Oct. 25, 1955.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 13,673

International Longshoremen's & Warehousemen's Union (CIO), and International Longshoremen's & Warehousemen's Union, Local 8,

Appellants,

vs.

Hawaiian Pineapple Company, Ltd., a corporation.

Appellee.

Hawaiian Pineapple Company, Ltd., a corporation,

Appellant,

vs.

Martin E. Aden, et al.,

Appellees.

JUDGMENT

Appeals from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is

affirmed, each side to bear its own costs, except that the cost of printing the transcript shall be borne equally by the parties.

It is hereby further ordered and adjudged by this court that the Hawaiian Pineapple Co., Ltd., recover against the International Longshoremen's & Warehousemen's Union (CIO) and International Longshoremen's & Warehousemen's Union, Local 8, for one-half of the printing costs advanced by it in excess of one-half of the total printing expense.

(Endorsed) Judgment

Filed and Entered: October 25, 1955
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday,
January 11, 1956

Before: Healy, Bone and Chambers, Circuit Judges.

ORDER DENYING PETITIONS FOR REHEARING

On consideration thereof, and by direction of the Court, it is ordered that the petition of International Longshoremen's & Warehousemen's Union (CIO) and International Longshoremen's & Warehousemen's Union, Local 8, filed December 19, 1955, and the petition of Hawaiian Pineapple Company, Ltd., filed December 24, 1955, and within time allowed therefor by rule of Court, and valid extension thereof, for rehearings in the above cause, be, and each of them hereby is denied.

STATUTES INVOLVED

Section 303 of the Labor Management Relations Act of 1947, upon which respondent allegedly based its cause of action, reads in relevant part as follows:

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> "(1) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;
>
> * * * * * * *
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Section 301 of the same Act reads in relevant part as follows:

"(a) Suits * * * between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization * * * and any employer * * * shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity * * * in the courts of the United States.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duty authorized officers or agents are engaged in representing or acting for employee members * * *

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In the Supreme Court of the United States

October Term, 1955

NO. 838

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 6,

Petitioners,

vs.

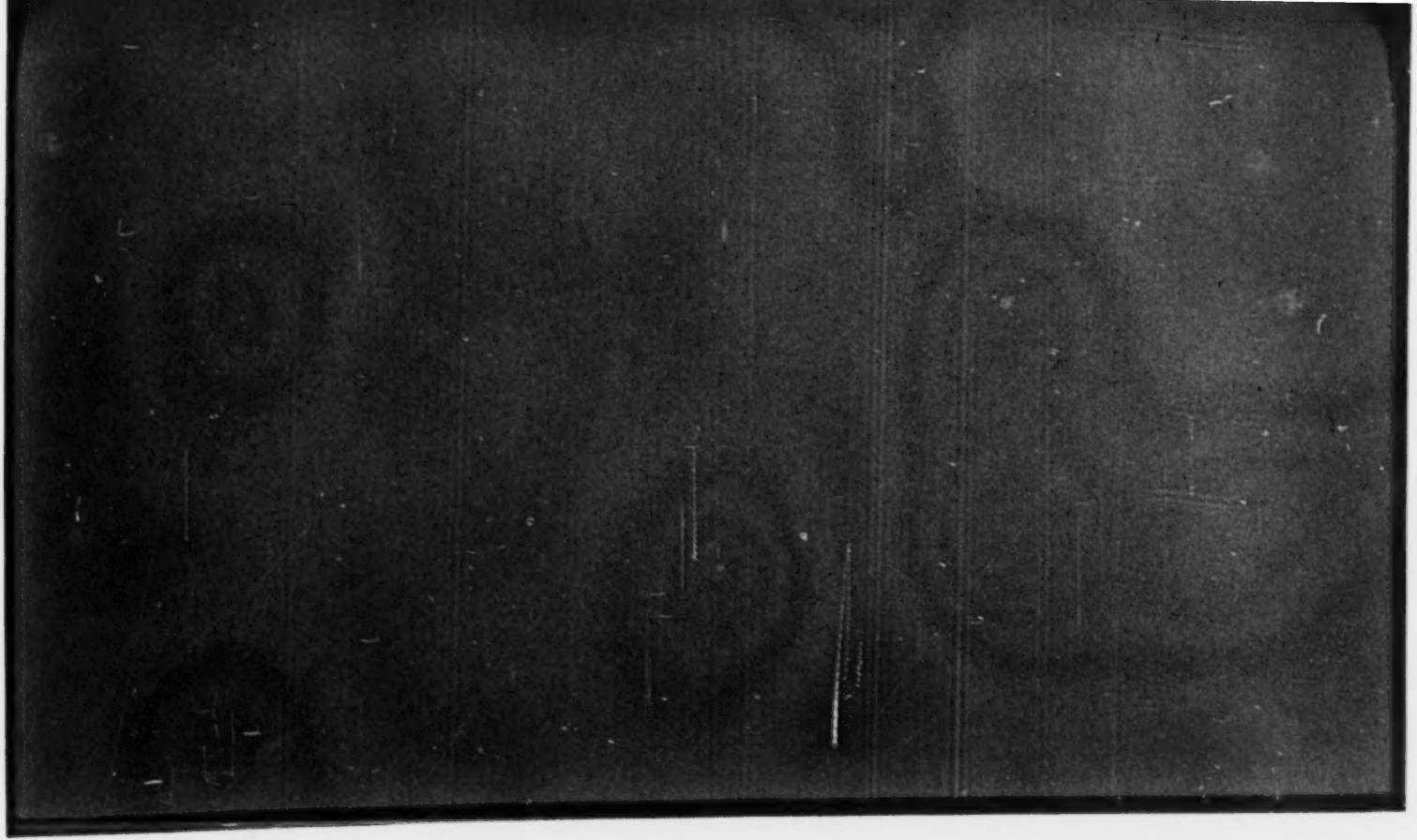
HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

DONAGH C. WALKER,
GUNTHER P. KRAUSS,
DENNIS LEHMAN,
Counsel for Respondent,
916 Portland Trust Building,
Portland 4, Oregon.

STEPHENS-ADAMS LAW PUB. CO., PORTLAND, ORE. 5-56



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In the Supreme Court
of the United States

OCTOBER TERM, 1955

NO. 838

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,

Petitioners,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The petition herein arises from an action instituted by respondent Hawaiian Pineapple Company, Ltd., (hereafter "Pineapple"), against petitioner labor unions under Section 303 (b) of the Labor Management Relations Act, 1947 (hereafter the "Act") 61 Stat. 158, 29 U.S.C.A. (Supp. 1955), Sec. 187, to recover damages for injury to its business and property sustained by activi-

ties of the unions in boycotting and preventing the delivery of a cargo of pineapple in violation of Section 303 (a) (1) of the Act[1].

Jurisdiction of the action against petitioner unions rested upon Section 303 of the Act and stemmed from admissions and contentions in the Pre-Trial Order and from proof adduced at the trial that: (a) Pineapple was a Hawaiian corporation growing and shipping pineapple to the United States mainland and to foreign countries for sale (R. 50); (b) petitioners International Longshoremen's and Warehousemen's Union (CIO) (hereafter "International") and International Longshoremen's and Warehousemen's Union, Local 8 (hereafter "Local") were labor organizations under Section 501 (3) of the Act (R. 50-51); (c) Pineapple was engaged in interstate commerce and the present action involved "industry or activity affecting commerce" under Section 501 (1) of the Act (R. 50, 157, 1050); (d) International and Local were allegedly engaged in various activities in violation of Section 303 (a) (1) of the Act (R. 57-63); and (e) Pineapple was injured thereby in its business and property (R. 61-63).

The action against the two unions was tried before a jury who returned a verdict of $201,274.27 in favor of Pineapple (R. 136).

Petitioners International and Local moved for a verdict in accordance with their motion for a directed ver-

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[1]The action was also brought against the unions and 99 individuals for engaging in unlawful common law acts, pursuant to a conspiracy. This aspect of the case is involved in No. 837 at this Term.

dict and also moved for a new trial, on the grounds herein asserted (R. 146-147). After briefing and argument, these motions were held under advisement for over a year by District Judge (now Circuit Judge) James Alger Fee and then denied in an extensive opinion which answered the errors now complained of by petitioners (107 F. Supp. 805; R. 149-177).

International and Local then appealed to the Court of Appeals for the Ninth Circuit, again on the grounds herein urged (R. 1476-1477), which Court also considered the matter for almost a year and then affirmed in all respects the jury's verdict against petitioners (226 F. (2d) 875; R. 1497-1521).

Inasmuch as petitioners are here making no new claims of error but are seeking another review of the same contentions which have twice been rejected below, we believe a fairer statement of the questions which petitioners would have this Court review on certiorari to be:

1. Whether the trial court's instructions to the jury concerning the Act were erroneous[2].

2. Whether the trial court's agency instructions were erroneous.

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[2]We are unable to follow petitioners' questioning whether the complaint stated a cause of action under Section 303 of the Act and whether the trial court had jurisdiction thereof (p. 5). Valid jurisdiction was obtained over the persons of International and Local; and valid jurisdiction over the subject matter was obtained by appropriate allegations that petitioners engaged in various activities affecting commerce in violation of Section 303 (a) (1) and 303 (a) (4) of the Act, as the result of which Pineapple was injured in its business and property (R. 53-63).

3. Whether the verdict against International and Local and the verdict for the individuals in No. 837 at this Term, are so legally inconsistent as to require reversal.

4. Whether the trial court's instructions concerning Pineapple's duty to minimize its damages were erroneous.

STATEMENT

Once again, we are unable to accept petitioners' statement of the case in which they purport to summarize the evidence. We suggest to this Court, as we have suggested to the courts below, that petitioners' statement is inaccurate, incomplete and highly misleading; and proof of this readily appears from the opinions of the two lower courts.

In the interests of brevity (should the Court wish to pursue the matter further) we have set out in Appendix A to this brief a Supplemental Statement of the Case, which chronologically spotlights some of petitioners' activities and points out the errors in petitioners' statement. We also respectfully refer the Court to the statement at pages 4 to 8, inclusive, of our petition in No. 837 at this Term.

ARGUMENT

The very nature of petitioners' "Question Presented" makes it amply clear why this case does not merit or warrant the granting of certiorari by this Court.

Having already received not one, but in effect two, extended appellate reviews of their contentions, petitioners now seek another hearing in this Court, relying again on the same shotgun full of alleged errors. All of petitioners' "specifications of errors to be urged herein" (p. 10) have previously been considered and rejected, as any reading of the opinion of the District Court and the Court of Appeals will indicate.

The only new note sounded by petitioners is a contention advanced in several instances that the decision of the court below is in conflict with "pronouncements" (p. 13) or with "principles" (pp. 20, 21) enunciated by this Court, or contrary to "expressions" (p. 27) of this Court. In fact, there is no conflict between the decision below and the decisions of this Court or of any Courts of Appeal. Even petitioners' asserted conflict of "principles" does not in fact exist, since the "principles" relied upon are not applicable to the facts herein.

Finally, petitioners have tacked on, seemingly as an afterthought, at the end of two of their points a statement that questions of "importance" are raised herein as to the application of Sections 301 and 303 of the Act (pp. 25, 28). Although this case involved applying of the Act to the facts herein, the application made by the trial court and affirmed by the Court of Appeals was in line with previous decisions of this and other courts and did not make any "new" law or venture into unchartered legal waters; nor did the case below pose any questions which require the benefit of this Court's action in order to clarify the Act or to enable lower courts uniformly to apply the Act.

I.

The Instructions as to the Act were Correct

The District Court instructed the jury, in part, that in order to recover under Section 303 (a) (1) of the Act, Pineapple had to prove by a preponderance of the evidence that either International or Local, or both, (a) induced and encouraged (b) the employees of any employer (c) to engage in a concerted refusal in the course of their employment (d) to use, transport or anywise handle any goods or perform any services in connection with Pineapple's cargo; (e) that one of the objects of the inducement or encouragement was to force an employer or person to cease doing business with any other person; and that (f) Pineapple sustained damage to is business and property as a direct and proximate result (R. 1424-1426).

With respect to requirement (b) that prohibited inducement and encouragement by petitioners had to be directed against the "employees of any employer", there were present at the Port of The Dalles the employees of various employers engaged in unloading the barge and transporting the cargo therefrom by rail and truck to California, namely, those of Pineapple, the Goodlet Crane Company, various trucking companies, the Union Pacific Railroad, and the Port of The Dalles. Instead of combining all of these classes of employees of employers[3]

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[3]The trial court excluded the employees of two employers: Union Pacific Railroad and the Port of The Dalles (R. 1420).

and presenting them in one instruction to the jury, as Pineapple did in its pretrial contentions (R. 57-58), the trial court divided its instructions into two parts: In one part, it considered the prohibited conduct of the unions against the employees of Pineapple (R. 1424-1425) and in the other part against the employees of the trucking companies and Goodat (R. 1425-1426)[4].

In this Court, petitioners assert there was a "legal excuse" to justify their activities at The Dalles, in that these were "primary activities" and hence Section 303 of the Act did not apply (pp. 11-14). The trial court dismissed this claim "as specious and not in accord with the facts" (R. 168); and, although assigned as specification of error in the Court of Appeals, "was examined and found without merit" by that Court (R. 1507).

Petitioners find such asserted "primary activities" in the alleged labor dispute they claimed to have with the Port of The Dalles. The record, however, shows that the claim of the unions in this regard is a sham one contrived as an afterthought. Nonetheless the trial court submitted their theory to the jury (R. 1429).

In this Court, as below, petitioners have shied away from spelling out the nature of their alleged dispute with the Port of The Dalles. No claim was or has ever

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[4]Petitioners complain (pp. 14-16) that these instructions were confusing and embodied inconsistent theories, in that in one Pineapple was the "prime employer" and in the other Pineapple was considered as the "other person". Petitioners here make the same misinterpretation of the instructions as they did below. The trial court at no time considered Pineapple as the "primary employer" but treated Pineapple as well as other concerns involved at the unloading as "employers" whose employees were encouraged to engage in a concerted work refusal.

been made that petitioners wanted to organize or represent the employees at the Port of The Dalles. Nor has the claim been made that petitioners wanted to have the work of unloading the barge assigned to them instead of to the employees of the Port (which would have been a violation of Section 303 (a) (4) of the Act). Instead, for the basis of the claimed dispute and the justification for the unions' activities, we are referred to the testimony of Meehan, International's paid employee and representative in Oregon, made almost two years later in Court to the effect that the Port was paying its employees lower wages and working longer hours than Portland longshoremen and was not observing a 21-pound load limit.

The speciousness of this claim is mirrored in the actual record of appellants' activities which shows that their true purpose was to boycott Pineapple's cargo and that the working conditions at the Port of The Dalles had nothing to do with their activities until it was necessary to later resort to them to escape the consequences of their earlier activities. The trial court, which observed all of the witnesses during the long trial, dismissed petitioners' claim of a labor dispute with the Port "as specious and not in accordance with the facts" (R. 168), stating:

> "It stands out with naked clarity that International moved to boycott this cargo for the sole purpose of exerting pressure upon the public in Hawaii by isolating the islands from the continent. The record not only establishes the boycott and its purpose, but negatives all other reasonable postulates." (R. 168-169)

Nonetheless, as noted above, the trial court submitted petitioners' claim of a labor dispute to the jury, specifically instructing them that a verdict should be returned for the unions if the jury found any inducement or encouragement by them "was solely for the purpose of concerted activity on account of wages, hours, or conditions of employment, as the defendants claim, or to obtain jobs for themselves" (R. 1429). By its verdict the jury must have found that petitioners' activities were not for the purposes which they now say motivated them.

Petitioners also here say they were engaged in "primary activities" in that Pineapple was so "closely allied" (p. 12) with the companies which were being struck against in Hawaii that petitioners' activities against Pineapple at The Dalles were protected. The short and complete answer to any such contention that, in effect, Pineapple was the "primary employer" with respect to International and Local has already been given by both the trial court (R. 169-174) and the Court of Appeals (R. 1502), namely, there is no such evidence in the record.

Admittedly, Pineapple had no relationship or connection, by employment or otherwise, with International or Local or with the Hawaiian local. Pineapple and its transportation subsidiary, Isleways, were at no time engaged either in Hawaii or in this country in any controversy or labor dispute of any kind with their own employees (R. 1015-1017). The only connection shown in the evidence between petitioners and Pineapple was

the attempt of the unions to prevent the barge being unloaded in the United States after its departure from Hawaii. Such a connection does not transform Pineapple, the object of the boycott, from an employer which had no relationship to the boycotting unions into a "primary employer" against whom it is now said such tactics may be used with impunity.

As to the claimed "closely allied" relationship between Pineapple and the concerns involved in the Hawaiian strike, the evidence in the record is that one of these concerns, Castle & Cook, had less than a majority stock ownership in Pineapple, which hardly makes Pineapple the "alter ego" or instrumentality of Castle & Cook, even in labor relations matters (*Press Company, Inc., v. National Labor Relations Board,* 118 F. (2d) 937 (CA D.C. 1940), cert. denied 313 U.S. 595 (1941))[5].

There was thus no justification whatsoever for even the Hawaiian Local, let alone International and Local, to picket Pineapple and its product with whom they had no dispute. As the District Court stated in its opinion:

> "International, according to its own reiterated position, had no authority over the Hawaiian local, and the Portland local, which is approximately twenty-five hundred miles away, had no ground to boycott

[5]To support their argument that Pineapple was "closely allied", petitioners cite as evidence press statements made prior to the riot by Meehan to the editor of a small weekly newspaper in The Dalles, in which Meehan said that Pineapple was controlled by the "Big Five" (R. 537, 541). Propaganda mouthed by petitioners' strike leader at The Dalles in his bid to keep the barge from being unloaded is thus later resorted to and cited as proof of the truth of the propaganda itself: Pineapple and Castle & Cook are "alter egos" because Meehan said they were.

a product with which it had no connection by employment or handling against an employer with whom none had had any relation. No decided controversy, whether by administrative board or court, holds there is any basis for protected concerted action upon the facts claimed here." (R. 171-174).

No Conflict of Decisions

On the premise that they were engaged in "primary activity" at The Dalles, petitioners assert there is a "direct conflict" between the trial court's instructions and the "pronouncements" made by this Court in *National Labor Relations Board v. International Rice Milling Company*, 341 U.S. 665 (1951). Since there is no basis in the record for any such premise, the claimed conflict does not exist.

We are also told that the trial court's instructions considering the Union Pacific Railroad as a "person" with whom Pineapple could be forced to cease doing business under Section 303 (a) (1) of the Act is in "direct conflict" to the decision of the National Labor Relations Board in International Brotherhood of Teamsters, 84 NLRB 320. Whatever may have been the view of the Board, the correctness of the trial court's instruction is confirmed by this Court's recent decision in *Local Union No. 25 v. N. Y. N. H. & R. Co.*, No. 33 at this Term, and by *International Rice Milling Company v. N. L. R. B.*, 183 F. (2d) 21 (CA 7, 1950) Reversed other grounds, 341 U.S. 665.

II.

The Agency Instructions were Correct

In accordance with Section 301 (b) of the Act that a labor organization "shall be bound by the acts of its agents," the trial court instructed the jury at length on the applicable law of agency (R. 1418, 1432-1434).

The trial court specifically charged that Pineapple was "required to prove the existence of an agency relationship as to each officer or agent involved and the existence and extent of the authority" (R. 1433)[6].

As part of its instructions, the District Court also stated:

> "The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan

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[6]Section 301 (e) of the Act, which like Section 301 (b) is made applicable by Section 303 (b) to damage suits instituted thereunder, provides that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Senator Taft, the author of the Act, explained the language of Section 301 (e), which was inserted by the Joint Conference Committee of House and Senate in H. Rept. No. 510, 80th Cong., 1st Sess., was intended to restore "the law of agency as it had been developed at common law" and illustrated his statement by stating "union business agents or stewards, acting in their capacity as union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." 93 Cong. Rec. 6859 (June 12, 1947).

(1721) were agents and representatives of Defendant Local 8. *It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment.*" (R. 1432) (Emphasis supplied)

Petitioners here assert that the question of whether the individuals named in the above instruction were agents was one for the jury. Their argument in this respect has been rejected by both the trial court (R. 467) and the Court of Appeals ("It would appear that the unions were fairly protected when the court . . . [gave the above instruction] . . . to the jury" (R. 1503)).

The flaw running throughout petitioners' argument is that they have chosen to disregard the relationship between the named individuals and International or Local, on which the evidence was undisputed, and the authority of these individuals to bind either union by their actions, on which the evidence was disputed and which was accordingly submitted to the jury. It has always seemed significant to us that petitioners in making their argument always omit the last sentence of the above instruction, wherein the trial court submitted to the jury the questions of whether the named individuals had committed or had assisted in the commission of any of the acts charged and also whether such acts were in the scope of their employment.

The trial court named Meehan, Gettings, Bodine and Schmidt, the only ones to whom exceptions were taken

below (R. 1462), as agents and representatives of International, because, as it stated, the evidence showed "without cavil" they were so, and there was "no evidence to the contrary" or "no attempt to prove the opposite" (R. 167). There was thus no question of fact to be submitted to the jury as to the representative status of these individuals. The position of each of these individuals and their relationship to International was such that they were at all times persons who were employed by or who acted for and in the interests of International and were, in fact, agents[7].

As the courts below recognized, the trial court positively required the jury to find that the persons named by it were acting within the scope of their authority before the unions, or either of them, could be held responsible for any of their acts (R. 1432). The trial court aptly summarized many of its previously given and more detailed agency instructions when it charged the jury that:

> ". . . the question is one of fact, as far as this case is concerned, as to whether in the things he is proven to have done he was authorized, or that the matters fell within the general scope of his agency, or whether the International expressly ratified his acts

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[7]Meehan (R. 477, 759, 760, 800-802, 813, 849, 869, 1250-1252, 1322-1323, 1324, 1335-1336). It was even admitted in the Pretrial Order that at all times involved in the case Meehan was a paid employee of International assigned to work in Oregon (R. 51).

Gettings, Northwest Director of International (R. 491, 495, 700-702, 703-704, 707-708, 711-712, 732-735, 1358-1359; Exhibits 1, 2, 3, 4 and 5).

Schmidt, International representative in Hawaii (R. 703-704; Exhibits 1 to 5, inc.).

Bodine, International representative on Coast Labor Relations Committee (R. 773, 817, 1300-1304; Exhibits 5, 21, 185).

thereafter with the intention to do so and with knowledge of the facts." (R. 1434)

Under the instructions of the Court, the entire issue of the responsibility of either or both unions, for the actions, if any, of any of the individuals named by the Court, was left to the jury to determine as questions of fact. Stating what the evidence unequivocally showed with respect to the relationship of each of these individuals to International or Local in no way deprived the petitioners of their unquestioned right to have a jury trial upon all the contested agency issues of fact.

No Conflict of Decisions

Petitioners purport to find a conflict between the trial court's agency instructions and the decisions of other Courts of Appeal, including even the Ninth Circuit, to the effect that contested agency questions are for the jury[8].

On the contrary, we believe the principles announced in petitioners' cited cases to be completely in line with the decision below. So, for example, in the Ninth Circuit case (*Pacific Can Co. v. Hewes*, 95 F. (2d) 42) the trial court submitted to the jury the question of whether

[8]Petitioners' reliance upon *United Brotherhood v. United States*, 330 U.S. 395 (1947) overlooks the fact that there was involved therein a criminal prosecution for conspiracy to violate the Sherman Act, on which this Court held that the provisions of Section 6 of the Norris-LaGuardia Act were applicable and pointed out that in a criminal case a Judge may not direct a verdict of guilt no matter how conclusive the evidence. In the present case the statutory test of agency in Section 301 (e) of the Act was specifically designed to avoid any possible application of the United Brotherhood case. (93 Cong. Rec. 6859 (June 12, 1947)).

the defendant's vice president was acting within the scope of his authority, which action was affirmed by the Court of Appeals as a proper agency issue to be submitted.

As a matter of fact, the agency matters involved in this case are strikingly similar to those resolved by the Ninth Circuit and affirmed by this Court in *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation,* 189 F. (2d) 177 (1951), aff'd 342 U.S. 237 (1952). A suit for damages under Sec. 303 (b) of the Act was brought against International and its local in Alaska for a violation of Sec. 303 (a) (4). An issue in the case was whether International was responsible for the damages inflicted on the plaintiff by reason of the activities of its "International representative" in Alaska, one Albright. The trial court instructed the jury on agency much along the same lines as the trial court herein, which instructions were upheld[9].

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[9]"It is undisputed that Germain Bulcke, John Berry and the witness Vern Albright were, during the time covered by this controversy officers of International, hence they were agents. But it is for you to say, whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment." Court's instruction to the jury No. 4, Transcript of Record, pp. 49-50, Appeal No. 12527.

See also, *United Electrical, Radio and Machine Workers v. Oliver Corp.,* 205 F. (2d) 376 (CA 8, 1953), where one Hobbie was a representative of International union with the duty of assisting and advising locals in his district, and the court upheld instructions to the jury that the issues of liability with respect to International were:

> "Whether Charles W. Hobbie induced or promoted the strike, and whether in so doing he was acting within the scope of his agency as an agent for the International union." (205 F. (2d) at 386).

III.

The Verdict against Petitioners is not Inconsistent

Petitioners' claim (rejected by both courts below) that there was an inconsistency in the verdict against the unions and in favor of the individuals, runs counter to the long established rule enunciated in federal cases that logical consistency in verdicts is not required. *Dunn v. U. S.*, 284 U.S. 390 (1932); *Jayne v. Mason & Dixon Line*, 124 F. (2d) 317 (CA 2, 1941); *Telfian v. Sanford*, 147 F. (2d) 945 (CA 5, 1945), cert. denied 325 U.S. 869; cf. *Clark v. Langsburgh*, 38 F. Supp. 729 (D.C. 1941), aff'd 127 F. (2d) 331 (CA D.C. 1942).

All that is legally necessary for a verdict is that it be sustained by the evidence. The verdict against petitioners was supported by substantial evidence, as witness the concise summary thereof which the trial court made in its opinion (R. 157-163).

Moreover, petitioners' claim rests on the false premise that the liability of International and Local was solely dependent on the liability of individuals named as defendants. The liability of the unions did not by any means necessarily depend on the actions of any or all of the individuals who were actually charged as defendants. So, for example, Local could have been bound by the acts of its members who participated but were not named as defendants herein, or by the assistance which it gave to the Hawaiian picket, or by its ratification of the actions of its members who were indicted and plead guilty to riot. Likewise, as charged by Pineapple, Inter-

national could act and be bound through the agency of Local. *Brown v. Oil Worker's International Union*, 80 F. Supp. 708 (N.D. Calif., 1948).

There could not, in any event, be any inconsistencies between the verdict as to the unions and the individuals because the liability of each was submitted to the jury upon different findings of fact. Thus, the trial court itself, in rejecting petitioners' claim of inconsistency, stated:

> "... Here the charge involving the individuals is a conspiracy to effect unlawful acts. The individuals may have done or assisted in doing the acts; the unions may have been found to have done the acts and thereby have incurred responsibility; but the mere fact that certain individuals who may have done certain acts were not found to have entered into a conspiracy with the union to do them is of no consequence. The liability would have been on entirely different grounds . . . *the Court placed a somewhat greater burden upon Pineapple as to these individuals. Since there was a greater degree of proof required as to the individuals than as to the unions, there can be no inconsistency in the diverse findings.*" (R. 163-165). (Emphasis supplied)

No Conflict of Decisions

Petitioners say there is a conflict between the present case and "principles" enunciated by this Court and other federal courts in master and servant respondeat superior cases.

For the reasons noted above these cases have no application to facts involved herein; and even in the usual master and servant case where the servant is exonerated and the master is held, courts have always held that the verdict is not inconsistent where the

alleged acts could have been caused by other servants or agents. *Southeastern Greyhound Lines v. McCafferty*, 169 F. (2d) 1 (CA 6, 1948), cert. denied. 335 U.S. 861 (1948); *Fish v. Southern Pacific Co.*, 173 Or. 294, 324, 143 P. (2d) 917 (1943).

IV.

The Instructions as to Minimization of Damages were Correct

The trial court gave the jury the following instruction on the duty of Pineapple to minimize its damages:

> "In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages." (R. 1441-1442).

The specific ground of petitioners' objections to this instruction was that the trial court failed to detail the evidence showing the particular ways in which petitioners contended Pineapple could have minimized its damages (R. 1457)[10].

Once, it is acknowledged, however, that the trial court made an accurate charge—petitioners have never

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[10]It should be noted that the trial court had previously instruced the jury with respect to petitioners' contentions:

"Defendants contend plaintiff could have purchased ample pineapple from other sources without money loss and thereby minimized damages.

Defendants contend that plaintiff could have refrained and refused to buy large quantities of fresh fruit in 1949 under its

contended otherwise—the "extent of its amplification must rest largely within his discretion". *United States v. Bayer*, 331 U.S. 532, 536 (1947).

It was the burden of the petitioners to prove that Pineapple failed to reasonably mitigate its damages. *Lerman v. Fruit Processors, Inc.*, 191 F. (2d) 349 (CA DC, 1951).

In the last analysis the question was one of fact for the jury to determine. The issue was presented to them on a correct statement of the law. The jury's verdict bespeaks their findings on this issue. When petitioners here assert (pp. 26-27) that Pineapple failed to take any action to minimize its damages (which claim is refuted by the record)[11], they are simply repeating their arguments to the jury. This Court is not a forum to relitigate issues of fact.

Both the trial court (R. 166-167) and the Court of Appeals (R. 1504-1505) have squarely ruled on petitioners' contentions, finding them to be without merit.

When petitioners say (pp. 27-28) that sustaining the verdict herein would be contrary to the "expressions" of this Court and the decisions of other circuit courts, they are misapplying the decisions cited which have no bearing in our case. We know of no decision—and petitioners have cited none—that holds that where the duty to minimize damages is tried as a contested issue of fact and

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contracts to purchase fresh fruit from growers thereof without money loss and thereby minimize their damages." (R. 1424) This was in accordance with petitioners' contentions in the Pre-Trial Order (R. 65-66).

[11]R. 958-961, 964-965, 976, 977-978, 982-984, 988-989.

is submitted to the jury under a correct statement of the law that error has been committed.

Any claim by petitioners that the jury's verdict was too high because the jury gave no consideration to the minimization of damages flies in the face of the record in this case[12]. As the trial court stated:

> ". . . But the Court would have upheld a verdict in a much greater sum within the limits of the prayer of the complaint, if it had not been for an express disclaimer by Pineapple during the trial. The jury returned a lesser sum probably because they believed Pineapple would be satisfied to accept that amount. In view of the actions for which the unions were found liable, the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors. The Court agrees." (R. 166-167)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD C. WALKER,
GUNTHER F. KRAUSE,
DENNIS LINDSAY,
Counsel for Respondent,
916 Portland Trust Building,
Portland 4, Oregon.

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[12]In the Pre-Trial Order, Pineapple contended that it was entitled to damages of $234,280.29 (R. 61). The verdict in favor of Pineapple was for the sum of $201,274.27 (R. 136).

(Appendix A follows)

APPENDIX A

Supplemental Statement of the Case

Commencement of Boycott

The background of the present case lies in the Hawaiian dock strike of 1949, which was called by International and its affiliated local in Hawaii against the stevedoring companies and commenced May 1, 1949 (R. 1017). Pineapple was not a party to or involved in this strike (R. 1015-1018).

As a result of the strike, and the tie-up of all transportation from Hawaii, Pineapple was unable to export its products through its usual method of using ocean freighters (R. 1018). Faced with orders for 68,300 cases of pineapple from processors of fresh fruit in California (R. 912-913; Exhibit 188) and requiring pineapple at its own plant at San Jose, California, Pineapple chartered in August, 1949, an ocean-going barge YFN from the United States Navy and loaded it, with employees of Isleways, Ltd., (a wholly owned subsidiary of Pineapple) at the latter's terminal in Honolulu with a cargo of approximately 115,000 cases of pineapple worth more than $680,000.00 (R. 915, 918-919, 1014-1015, 1018, 1091).

No attempt was made to interfere with the loading of the barge in Hawaii. Prior to its departure for the mainland there were no disturbances or labor difficulties of any kind connected with it[1]. As noted, Pineapple

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[1]However, three days prior to the departure of the barge the International representative in Hawaii cabled International's Regional Director in Seattle concerning the barge and asking whether the International Longshoremen's Association in Tacoma would handle the barge (Exhibit 1).

and Isleways were not engaged in any dispute with their own employees and were not parties to the labor dispute and strike between the stevedoring companies and International and its affiliated local union (R. 1015-1018).

Although the barge was towed across the Pacific Ocean towards the San Francisco Bay area, it proved to be impossible to make arrangements there to unload the barge because of the certainty that the ILWU would boycott it (R. 1020). The barge was accordingly diverted to Puget Sound and the Port of Tacoma where longshoring work was done by the International Longshoremen's Association (R. 1020-1021). When Pineapple contacted this latter union in Tacoma to arrange for the unloading of the barge, they refused to handle it as a result of International's activities (R. 1022-1024)[2].

Being unable to unload in Tacoma, Pineapple was again forced to seek a port where the ILWU did not operate and finally made arrangements with the Port of The Dalles at The Dalles, Oregon, on the Columbia River approximately 90 miles east of Portland, whereby the latter agreed to discharge and unload the pineapple from the barge and to load it upon railroad cars and trucks for shipment to California (R. 474-483, 496-500, 1024). Railroad cars were ordered from the Union Pacific Railroad, as well as trucks from various truck common carriers (R. 1014, 1034-1035). Pineapple also entered

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[2]It was developed at the trial that International's Regional Director had contacted the various maritime unions concerning the barge and particularly the ILA, claiming the barge was loaded under strike conditions in Hawaii and hence was considered "hot cargo" and would be picketed if an attempt was made to unload her (Tr. 705-710).

into an agreement with the Goodat Crane Service for the lease of a crane and an operator to lift the pineapple from the barge to the port dock (R. 883, 1040). The barge arrived at the Port of The Dalles on Saturday evening, September 24, 1949, with unloading scheduled to commence on September 26 (R. 1024-1025, 1041).

Boycott at The Dalles

On September 23, a day before the arrival of the barge, Meehan (admittedly the paid employee of and representative of International in Oregon, R. 51) went to The Dalles to meet with Commissioners of the Port of The Dalles for the purpose of forcing the Port to give up its agreement to unload the barge (R. 477-480, 500, 502)[3]. Labeling the barge "hot cargo" loaded by "unfair labor", Meehan charged that Pineapple was trying to break the strike in the Hawaiian Islands and that he would picket the Port if any attempt was made to unload the barge.

On September 25 the crane leased by Pineapple was brought to The Dalles (R. 876, 883). As it was being assembled a number of the longshoremen who had been standing in the entrance to the Port dock came over to tell Goodat's employees that they had better not take the crane out on the dock if they intended to unload some "hot pineapple" because "it is liable to melt the boom off, and it won't be healthy for you" (R. 879).

[3]No sooner had the barge left the Puget Sound area than International's Regional Director in Seattle had contacted Meehan, and instructed him to talk to International about future action (R. 732-735, 1359-1360).

When the owner of the crane himself was threatened in his home by men identifying themselves as from the "Hawaiian Pineapple job" at The Dalles, he terminated the lease arrangement and Pineapple was forced to buy the crane (R. 885-886, 1041).

On September 26 after the arrival of the barge at the Port dock, Meehan and the President of Local met with the Commissioners of the Port of The Dalles, threatening them again not to unload, Meehan stating he had 20 pickets there and could easily get 200 more (R. 480-485, 502-505).

As threatened, various individual longshoremen from Local began to picket on September 26 at the entrance to the Port dock. Similarly, on September 26 a Hawaiian longshoreman from International's local union in Hawaii began to picket at the Port dock (R. 52-54, 417, 506, 1254, 1315)[4]. Meanwhile, Meehan contacted various officials of other labor unions (the Railroad Brotherhoods, the Teamsters, and the Inland Boatmen) about observing the picket line set up at the Port dock (R. 780-784, 889). By September 27 the picket line had grown to 75 to 100 longshoremen (R. 584).

The Riot

On September 28, the President of Local admittedly dispatched at least 150 to 200 individual longshoremen members of Local from the union hall in Portland to picket before the entrance to the Port dock (R. 888-890,

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[4]The Hawaiian picket, according to the Secretary-Treasurer of Local 8, "wasn't representing Local 8 which had no Hawaiians in its membership" (R. 1317).

1275-1276). Local paid for the gasoline used by these individual longshoremen in driving to The Dalles and back and also paid for their meals while they were in The Dalles (Exhibit 184; R. 892-894, 1256-1257).

By noon there was a mass picket line of over 200 longshoremen before the entrance to the Port dock (R. 433-434, 506, 585; Exhibits 47-66, inc.)[5]. Every vehicle that went in and out of the Port dock was checked and every driver asked if he had any dealings whatsoever with Pineapple. If not, the driver was given a slip saying he had no connection with Pineapple and permitted to go on to the dock (R. 438-439, 548).

The pickets also passed out circulars to the citizens of The Dalles signed by "International Longshoremens and Warehousemens Union" containing a message to to the people of The Dalles that the "Big Five" of Hawaii were trying to break the Hawaiian strike by unloading their "scab pineapple" in the Port of The Dalles (Exhibits 23, 25; R. 371-372). Meehan confirmed that he had "something" to do with the preparation of the circulars (R. 808)[6].

On hearing that Pineapple had two large trucks waiting outside The Dalles to come in to the dock, four

[5]The record does not make exactly clear who was in charge of the massed pickets: Meehan advised the Assistant Chief of Police at The Dalles that he was in charge of the picketing (R. 594-595), whereas the Secretary-Treasurer of Local stated that the officials of Local 8 were in charge at The Dalles (R. 1311-1312).

[6]In a press interview a few hours before the riot on the dock, Meehan told the Editor of The Dalles Optimist "that the ILWU was born in violence and had to have violence to continue to exist" (R. 521).

of the longshoremen went from the dock to persuade Pineapple's drivers to refuse to drive the trucks on to the dock. However, after receiving a clearance from their own A. F. of L., Teamsters local union, the drivers decided to proceed to the dock (R. 677-680, 695, 1098-1099, 1119, 1121-1122, 1125-1126, 1136, 1140-1141, 1143).

When these trucks drove on to the Port dock, the massed longshoremen turned into a "riotous mob" and stormed through police on duty and rushed to the Port dock where they assaulted Pineapple's employees and damaged and destroyed its property. Witnesses testified that the damage effected by rioting longshoremen was done by "team work" and that they marched off the dock in an orderly way after the riot, where the Mayor of The Dalles and another disinterested witness heard Meehan address the assembled longshoremen and tell them that "they had done a fine job" (R. 369-370, 461, 571, 574, 580, 660).

Post-Riot Activities

On the day following the riot the President of Local again dispatched members of his union to The Dalles, and Local again paid for their gasoline and meals (Exhibit 184; R. 890, 1256-1257). Some 200 to 300 members of Local patrolled the streets of the City of The Dalles, terrifying the people of the community (R. 443, 445, 457, 416-463, 1042). Again circulars were distributed over the signature of "The International Longshoremen's & Warehousemen's Union—CIO" blaming the

violence of the day before at the Port dock on the Big Five companies of Hawaii and expressing regret "for the incident of yesterday, even though we feel it was not our fault. We are accustomed to having our picket lines respected" (Exhibit 24).

The riot put a stop to the unloading of the barge. It was not until October 19 that Pineapple was able to effect repairs to its crane and trucks and make arrangements to load cargo from the Port dock on to railroad cars and trucks (R. 486, 1038, 1040, 1043).

On October 20, however, longshoremen with "ILWU" banners again picketed at the entrance of the Port dock, bringing an end to the unloading operation and forestalling the movement of any cargo from the dock (R. 488, 512, 890, 1044). This picket line was finally removed by an injunction against International and Local (R. 489-490, 512-513, 1043-1046). By the end of October, Pineapple was finally able to commence moving its cargo by truck and by rail to its San Jose, California, plant (R. 1046). The barge was finally completely unloaded on November 8 (R. 1047).

When 22 individual members of Local were arrested and indicted in the Circuit Court of the State of Oregon for the County of Wasco for the crime of riot, Local put up the bail money to release the indicted men and retained counsel to defend them. So too, when these individuals were convicted by pleading guilty, Local paid their fines and also reimbursed them for the wages which each of the convicted men lost as a result of the criminal proceedings (Exhibit 184; R. 895, 1259-1260,

1319-1320). Harry Bridges, the President of International, testified that the ILWU also furnished money to Local in connection with the defense of the indicted longshoremen (R. 873-874). Local also received financial contributions for the expenses it incurred in picketing at The Dalles from other ILWU unions through International (R. 896-898, 1258-1259, 1316-1317)[7].

Petitioners' Statement of the Case

Petitioners' six-paragraph statement of the case (pp. 6-9) seems designed to convey the impression that the actions taken by International and Local were justified as part of a revolt of the downtrodden serfs of Hawaii against the "Big Five" corporations which are said to rule the Islands, and as an effort to preserve the economic well-being of thousands of longshoremen in Portland, Oregon; and that in any event the riot, which destroyed Pineapple's property and injured its employees, was only a "completely spontaneous" and sudden flare-up and should not be allowed to confuse the picture.

Petitioners' statement is not in accord with the facts and does not find support in the record in this case. The references to the claimed nature of the Hawaiian strike and Pineapple's relation to it are not based upon testimony relating thereto given at the trial but are

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[7]The Secretary-Treasurer of Local 8 teletyped International's San Francisco office on November 8, 1949 that:

"WE ARE IN THE BITE PLENTY BECAUSE OF THE PINEAPPLE BARGE. WE WANT NO MORE OF IT HERE OR ANY WHERE ELSE. WUD LIKE TO HEAR AN INDICATION AT LEAST OF SOME SUPPORT FROM ILWU IN REGARD TO OUR PREDICAMENT HERE. WE ARE SICK OVER THE WHOLE DAMNED DEAL . . ." (Exhibit 185).

based upon charges which Meehan made prior to the riot in talking to a newspaperman (R. 537).

As to Pineapple's reason for chartering the barge, it had orders for 68,300 cases of pineapple from processors of fresh fruit in California and required pineapple at its own plant in San Jose and was prevented by the Hawaiian strike from using an ocean freighter (Exhibit 188; R. 912-913, 1018). Petitioners mis-state the evidence when they say Pineapple's orders from its customers contained strike clauses. There is no such evidence. Such clauses were contained in agreements of Pineapple's San Jose plant for the purchase of fresh fruit from California growers and such clauses had nothing to do with the pineapple on the barge or with the orders Pineapple had therefor.

As to why the barge went to the Port of The Dalles (p. 7), the evidence shows that after unloading was impossible due to the ILWU in the San Francisco Bay area and in Tacoma, Pineapple sought out a port where the ILWU did not operate (R. 1020-1024). The Port of The Dalles was an open port without contracts with anyone, where river vessels and barges regularly loaded and discharged and where railroad cars were available; and the Port had employees that did cargo work (R. 474-475, 478).

As to the unloading of the barge by the Port being an "obvious threat to the economic well-being" of thousands of skilled longshoremen (pp. 7-8), petitioners here depart from the evidence and resort to the same

specious claim (devised some time after the riot) which was rejected by the jury and the courts below.

Finally, petitioners' "spontaneous combustion" theory advanced in explanation of the riot (p. 8) simply ignores all the evidence. Petitioners' theory was well disposed of by the District Court, when it stated:

> ". . . I am never going to instruct that when you gather 300 men in one spot under these circumstances you can then claim it was a result of a flash of temper. . . ." (R. 1452).

Table of Authorities Cited

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United Mine Workers v. Patton, 211 Fed. 2d 742, 5 Cir.	8
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 838

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,
Petitioners,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Respondent.

REPLY MEMORANDUM FOR PETITIONERS.

Respondent appears to think that since the courts below rejected the contentions advanced by petitioners, this Court should do likewise (Op. pp. 5-10, 11, 14, 17, 21). But it is precisely because those contentions were rejected below, resulting in conflicts with views previously expressed, either here or in other circuits, that review is now sought. Clearly the opinion of a court

whose judgment is sought to be examined by writ of certiorari is hardly authority in opposition to the petition for the writ.

Briefly considering the points made, we wish to make the following observations:

I.

A. The argument (Op. pp. 6-8) that there was no evidence to support the theory that petitioners had a legitimate primary interest in the situation at The Dalles ignores the evidence referred to at pages 11-12 of the petition. We are not calling upon this Court to evaluate the evidence; we merely urge that in the face of such evidence it was not "proper" as the court below thought to submit the case to the jury on the theory that there was "no legal excuse" (226 Fed. 2d at 879; R. 1502; App. p. 78) for petitioners' conduct.

B. Nor does respondent's attempted distinction of *NLRB v. International Rice Milling Co.*, 341 U.S. 655 (Op. p. 11) hold water. That case held that the secondary boycott provisions of the Act did not apply in the absence of an inducement to the employees of the "neutral" employer to engage in "concerted" activities (341 U.S. at 670-1). Here, even on respondent's own statement of the facts (Op. App. A, pp. 3-4) it must be conceded that whatever inducement was shown to have been directed toward such employees, it did not have as its object "concerted" activity on their part. The few sporadic and isolated instances

of talking to the truck drivers and others were no more an inducement to "concerted" action than was the picketing in the *Rice Milling* case.[1]

C. Finally, the decision in *Local Union No. 25 v. New York etc. R. R. Co.*, 350 U.S. 155, does not necessarily resolve the conflict between the decision of the court below and that of the Board[2] as to whether, and for what purposes, a railroad is an employer within the meaning of the Act. All that this Court there said was that a railroad was not "precluded" from seeking the Board's aid in the prevention of unfair labor practices, and that the Board was not divested of jurisdiction under Section 8(b)(4) merely because a railroad was the "complaining party". However, this Court did not hold, and has never held, that an employer, subject to the provisions of the Railway Labor Act, may be either the "employer" or the "other person" referred to in Section 303 of the Act.

Furthermore, even though Sections 8(b)(4) and 303 have similar purposes, they represent independent statutory schemes for dealing with the problem (*ILWU v. Juneau Spruce Corp.*, 342 U.S. 237, 243-4), and determinations under one section are not conclusive in litigation involving the other. *United Brick and Clay Workers v. Deena Artware*, 198 Fed. 2d 637,

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[1]Certainly here, as in *Rice Milling*, the question of violence is immaterial so far as concerns the legal principles involved. That issue should be (341 U.S. 672), and here was, directed to the attention of local law enforcement officers.

[2]The citation given in the Petition (p. 14) to the Board's decision in the *Teamster* case was in error (an error which respondent did not catch [Op. p. 11]). The correct citation is: *International Brotherhood of Teamsters*, 84 NLRB 360.

642-3, 6 Cir., cert. den. 334 U.S. 897; *NLRB v. Deena Artware,* 198 Fed. 2d 645, 653, 6 Cir., cert. den. 345 U.S. 906. The extent to which, if at all, a railroad may be embraced within the provisions of Section 303 is still undecided.

D. The applicability of the "ally doctrine" cannot be determined, as respondent suggests (Op. p. 10) by a decision that a nonemployer may not be required to comply with a Board order directing reinstatement and back pay, even though it owns some stock in the employer corporation (*Press Company v. NLRB,* 118 Fed. 2d 937 [D.C. Cir.]). Here, there is no question of fastening liability on respondent for the unlawful conduct of other employers, which was the issue in the *Press Company* case. There is here presented the quite different issue of whether the economic ties between respondent and the other Hawaiian employers were sufficiently close to preclude the application of Section 303 under the rulings in *Douds v. Metropolitan Federation etc.,* 75 Fed. Supp. 672, S.D.N.Y., and *NLRB v. Business Machines etc.,* 228 Fed. 2d 553 [2d Cir.]. That issue has not yet been resolved here. For the reasons set forth in the Petition (pp. 12-13), it should be.

II.

Respondent concedes (Op. p. 15) that petitioners had an "unquestioned right to have a jury trial" on the agency question, but ignores the fact that the peremptory instruction of the trial court (Op. p. 12) deprived them of that right. It is no answer to petitioners' contention to say that there was submitted

to the jury the question of whether the named individuals were acting within the scope of their employment (Op. p. 13), for this assumes the primary question: Were the named individuals agents of petitioners, and if so, of which?

In order to hold either petitioner liable, it was necessary for respondent to establish its liability vicariously. For this it is necessary that two factors coexist: (1) That the actor be an agent of the principal, and (2) that he act within the scope of his agency. What respondent fails to recognize is that a correct instruction relating to the second factor does not cure the refusal of the courts below to permit the jury, under proper instructions, to determine whether the first factor existed.

The suggestion (Op. pp. 13, 15) that the peremptory instruction was justified because the evidence was "undisputed" simply ignores the evidence cited in the Petition (pp. 17-18, n. 14). Nor does the Petition call upon this Court to evaluate the conflict between testimony relied upon by petitioners and that referred to by respondent (Op. p. 14, n. 7). All that is required is that, in the face of the conflict, the courts below be directed to follow this Court's rulings in *Gunning v. Cooley*, 281 U.S. 90, and *United Brotherhood of Carpenters. v. United States*, 330 U.S. 394,[3] and thereby permit the jury to decide whether the named

[3]And also the decisions to the same effect from the other circuits cited at pages 18-19 of the Petition.

individuals were in fact agents of either petitioner, and if so, of which.[4]

III.

Respondent, as did the court below, indulges in a variety of hypotheses to justify imposing liability upon the alleged principals despite the complete exoneration of their "agents". (Op. pp. 17-19.) But none of these "theories"[5] were submitted to the trial jury and may not now be used to sustain a palpably improper verdict.

Respondent's failure to consider the "general principles" of *respondeat superior* liability laid down by this Court in *New Orleans etc. R. R. Co. v. Jopes*, 142 U.S. 18, and by other Federal and State courts (Petition, pp. 22-23) indicates its inability to come to grips with the issues *as they were presented to the jury*, and not as they were subsequently rationalized on appeal.

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[4]Neither *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237, nor *U.E. v. Oliver Corp.*, 205 Fed. 2d 376 (8 Cir.) (Op. p. 16) is in point. In the former case no claim was made, either in the Court of Appeals or here, that the charge quoted by respondent (Op. p. 16, n. 9) was in error. In the latter case the fact of the agency (as distinguished from its scope) was not an issue. See 205 Fed. 2d at 381, 386 and Appellant's brief therein, No. 14661, 8 Cir. Thus the question here presented was not present in either of those two cases.

[5]E.g. "Members who participated but were not named as defendants", or "assistance to the Hawaiian picket", or "ratification of the acts of its members who . . . plead guilty to riot", or "International could act and be bound through agency of local". Compare the different theories advanced by the court below (211 Fed. 2d 881; R. 505; App. 83).

IV.

On the minimization point, the very case cited by respondent (Op. p. 20) supports petitioners, for there the court made its own independent examination of the record and applied to it the principles enunciated in the cases heretofore cited by us for the purpose of determining whether the "general rule . . . that 'the seller himself minimize or keep down his damages' " (*Lerman v. Fruit Processors,* 191 Fed. 2d 349-356 [D.C. Cir.]) had been complied with. Here the court below *expressly refused to do this* (226 Fed. 2d 880; R. p. 1504; App. p. 81) and thereby not only committed error, but rendered a decision in conflict with holdings in this Court and in other circuits in the cases cited at pages 25-28 of the Petition.

CONCLUSION.

As the court below recognized, this case presents a number of new questions respecting the application of Sections 301 and 303 of the Act. Those questions have not been, but should be, passed upon by this Court. The increasing number of damage suits being brought by employers against unions under those sections of the Act[6] require that these questions be set at rest at this time.

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[6]A hasty examination of the recently reported decisions uncovers the following cases involving these sections of the Act: *Garmeade Coal Co. v. International Union etc.,* 230 Fed. 2d 945, 6 Cir.; *International Brotherhood etc. v. W. L. Mead, Inc.,* 230

For the foregoing reasons, the Petition for the writ of certiorari should be granted, and the judgment below reversed.

Dated, San Francisco, California,
May 28, 1956.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

Fed.

Fed. 2d 576, 1st Cir.; *Lincoln Mills v. Textile Workers Union*, 230 Fed. 2d 81, 5 Cir.; *United Mine Workers v. Patton*, 211 Fed. 2d 742, 5 Cir.; *Claycraft Company v. United Mine Workers*, 204 Fed. 2d 600, 6 Cir.; *Douglas v. International Brotherhood etc.*, 136 Fed. Supp. 68, W.D. Wash; *Wilson Bros. v. Textile Workers Union*, 132 Fed. Supp. 163, S.D.N.Y.